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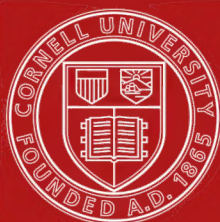
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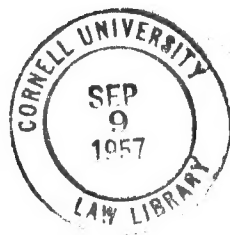
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## P R E F A C E .

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THE design of this work is to present, in a condensed form, those legal principles which are of the most common use in the various transactions of business. While, to the profession, it offers a means of easy and ready reference; to the man of business it is presented as a guide, by the aid of which, he can avoid those hazards of litigation that often so seriously incommode his progress. It is also intended to supply an educational want, which is becoming more and more imperative, as the modes and relations of business grow more complex, intricate, and extended.

To render the work generally useful for the purposes designed, it is, with few exceptions, confined to the *Law Merchant*, and those principles of the *Common Law*, the knowledge of which is indispensable to the proper conducting of business. Very little reference is made to any peculiar provisions of Statute, or local law, as that is found to vary according to the policy of different States; while the *Law Merchant* and the *Common Law* are equally applicable to all except Louisiana.

The experience of the writer in teaching, as well

as in practice, has convinced him that the mere presentation of legal principles in the abstract, is of little value; and that the only proper method by which they can be acquired, is in connection with the facts and circumstances out of which they arise, through which they are developed, and to which they have a direct and necessary application. To point and apply a principle by its case, serving both as the means of its illustration, and the authority upon which it rests, is equally necessary, whether the object be to instruct a class, or to furnish guides to the public, or authority to judicial tribunals. As this has been generally the plan pursued, it is hoped it may commend it to the profession as a work of reference, to the scholar as the only effectual method of acquiring a knowledge of the law, and to the man of business as both affording the means of a clearer comprehension, and of securing to its guidance a greater degree of safety.

The forms appended are with a view both to illustrate, and to serve the common purposes of business. Forms are the embodiment of principles, and also the instruments through which the business affairs of life are transacted. To secure both these objects, a careful selection has been made of a few deemed the best adapted to answer the purpose of the one, and meet the wants of the other.

ALBANY, Nov. 1, 1860.



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# BOOK I.

## PROPERTY.

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### CHAPTER I.

#### GENERAL.

§ 1. THIS, in its largest sense, is the right which a man has in lands and chattels, and includes every species of acquisition in which it is possible to have an interest. Mercantile pursuits are almost wholly limited to Personal Property, which, as contradistinguished from Real, means that which is movable; which passes by delivery; which descends to the next of kin under the statute of distributions; which is subjected to the lien of an execution, and not of a judgment against its owner; and on the sale of which, by its possessor, there is always an implied warranty of title. The division into goods, chattels, and effects, is of little consequence commercially.

§ 2. A more important division, in a mercantile point of view, is into Things or Choses in Possession, and Things or Choses in Action.\* The first embraces all the Property to which the term Personal can apply, of which one has possession; while the second includes all such as the owner has not in possession, but in which he has a right of action; which, being enforced, will possess him of the thing itself, or its equivalent in value. An illustration of the first species of property is to be found in the merchant's stock in

trade, and the moneyed equivalent which he receives on its sale. The second receives a similar illustration in the charges upon his books of account, and the Bonds, Bills, Promissory Notes, or other securities received by him from the purchaser.

§ 3. Choses in Action by the Common Law are not assignable, so as to enable the assignee to sue for and recover on them in his own name. An exception to this occurs in the case of Negotiable Paper, which if payable to bearer may be transferred by delivery, and if to order, by endorsement. In Equity all Choses in Action are assignable, so as to give the full equitable title to the assignee, and the legislation of New York has made all Choses in Action assignable at Law.

§ 4. All Personal Property is brought under the same general principle, and that is, that no act of man can render it inalienable. It is ever the policy of the law that it shall remain free, and subject to all the contingencies of trade and traffic.

### QUESTIONS.

What is Property? What Personal Property? How distinguished from Real? What is the mercantile division of Personal Property? What property is embraced under Things or Choses in Possession? What under Things or Choses in Action? What illustrations of each? Are Choses in Action assignable? What exception? How in Equity? Is Personal Property inalienable?



## CHAPTER II.

### SPECIAL.

THIS includes every species of Personal Property which possesses a mercantile character, such as *Shipping, Good Will, Negotiable Paper*. Of these we have



## I. SHIPPING.

§ 5. The important inquiry in relation to shipping, regards the means of acquiring and transferring title. The only complete mode of doing this, and one recognised by the maritime courts of all nations, is a written bill of sale. This must be executed by the owner; as the master of the ship, unless in cases of extreme necessity, has no authority to sell. Ships are regarded as Personal Property; and hence upon a sale in port, a delivery of possession is necessary to consummate the purchase.

§ 6. To give a ship an American character, and to bring it under protection as an American vessel, it is necessary that it should be registered at the custom-house. To entitle it to this privilege, the owner, or part owner, must be a citizen of the United States, and ordinarily reside here, or be interested as a partner in a mercantile house having here its place of business. In case of a change of owners, a bill of sale is necessary in order to effect a registry, and although, as between the parties, a valid sale may be made without a transfer in writing, yet in such case, the vendee would be unable to avail himself of the privileges which would otherwise attach to it as an American vessel. An unregistered ship can sail on no voyage with the privilege or protection of a national character or national papers.

§ 7. The legislation on this subject is by Congress, under the constitutional delegation of the power to enact laws for the regulation of commerce. By an act passed in 1850, it is rendered necessary, in order to effect any person, other than the vendor or mortgagor, his heirs and devisees, or those having actual notice, to have any bill of sale, mortgage, hypothecation, or conveyance, recorded in the office of the collector of customs, where such vessel is registered or enrolled. Whether this will be held to control or supercede State legislation relating to the recording or filing of mortgages of Personal Property to render them constructive,

notice to third persons does not appear to have been clearly settled. This will involve the constitutionality of this act of Congress, and also some other considerations.

§ 8. To perfect the sale of a ship while abroad, or at sea, the delivery of the bill of sale, or other documentary evidence of title, operates as a transfer; and if the vendee within a reasonable time after her arrival in port, takes possession, his title will prevail against that of a subsequent purchaser or attaching creditor; but will be subject to all encumbrances and lawful contracts made by the master relating to the employment and hypothecation of the ship prior to notice of the transfer.

§ 9. The amount of interest and extent of power that can be legally exercised by a part owner of a vessel has been a question of difficult settlement. When a ship constitutes a part of the capital stock of a partnership, it becomes subject to the same principles that control other partnership property. Otherwise, the several part owners are remitted to the rights and remedies of tenants in common. Each can sell or encumber only the share he respectively owns. But in every thing relating to the repairs and necessities of the ship one part owner is regarded as agent for the others, and thus entitled to act for them; and so a master, duly appointed, where the owners are accustomed to divide the profits, can bind them all by contracts made in the course of his employment. Where, however, the creditor chooses to make his contract with one part owner, giving him alone the credit, and reserving no rights or remedies against others, he is considered as having made his election, and cannot afterwards look to the other part owners. All torts or wrongs personally committed or authorised, or occasioned to third persons by the negligence of one or more part owners, will, at Common Law, render each liable severally as well as jointly. But for wilful or malicious acts of injury the guilty party is alone liable. The Common Law principle which permits any one tenant in

common to seize upon the property and regulate the mode of its enjoyment to the exclusion of the rest, being accountable to them for its use, is so modified by public policy as to permit the Court of Admiralty to interfere in a case of conflict of opinion, and either decree a sale of the vessel, and distribution of the proceeds, or to place the vessel in the possession of one party to be employed in some voyage, on condition that they secure to the other its safe return or a full indemnity in case of its loss. This rule seems not to be limited to cases where a majority of part owners constitute the moving party, but embraces also those in which they are equally divided in opinion, giving in such case the right to employ the vessel to the party asking it, on giving such security and indemnity to the other. In the absence of any conflict of opinion a majority of the part owners, without any resort to Courts of Admiralty, may manage the property at their discretion; and even one part owner, under the same circumstances, may employ the vessel as he may deem most advantageous; his acts and contracts in such employment being binding upon the others. As to the party standing in the position of owner, and, as such, liable for repairs and necessities procured on the order of the master, it is now held that a mortgagee in possession assumes this liability, but not one who is out of possession. *Miln v. Spinola*, 4 *Hill*, 177.

## II. GOOD WILL.

§ 10. The second species of Personal Property possessing a mercantile character, is "GOOD WILL," a question as to the ownership of which often arises on the dissolution of a partnership. This consists in "the probability that the old customers will resort to the old place." The question presented has been whether, on the death of a partner, the good will of the business went to the surviving partners, or whether it was a partnership effect, and, as such, liable to be accounted

for by the survivors. So far as concerns professional partnerships, there seems to be little doubt of its surviving, but in those which are mercantile, it is sometimes of great value, and in proper cases, perhaps in all cases that admit of it, the Court of Chancery will direct it to be sold, and will restrain the former owners from pursuing a business which would render it valueless to the purchasers. *Dougherty v. Van Nostrand*, 1 Hoff. Chan. R. 68.

§ 11. An interest somewhat analogous to good will is the right to the exclusive use of a particular name or mark upon goods and merchandise, usually known as "TRADE MARKS." This right can only be acquired by special appropriation and undisturbed enjoyment. The name or marks to which the right attaches must be such as designate the origin or ownership of the articles, not those merely indicating their name or quality. A merchant or manufacturer will not be permitted to use the name or trade mark of another, although he may be ignorant of that fact, and honestly believe it is made use of for a merely technical purpose. In cases of violation of this right the Court of Chancery is usually applied to for an injunction to restrain all further use of the name or mark. In granting relief in such cases the Court does not require an exact similarity to be shown between the two marks. It is enough that one is so closely imitated from the other as to deceive the public and draw away customers.

### III. NEGOTIABLE PAPER.

§ 12. The third species of Personal Property possessing a mercantile character is "NEGOTIABLE PAPER." The peculiar mercantile character that serves to specialize this species of property, and to distinguish it from every other, is found in its transferable quality. The general rule applicable to all sales or transfers of Personal Property is, that the vendor transfers no greater right or title in the thing sold to the

vendee than he himself possesses. But under some circumstances negotiable paper furnishes an exception. When made payable to bearer, or to order and endorsed in blank, the title to it is transferable by mere delivery, and the vendee, or holder, receiving it before due in the ordinary course of business for a valuable consideration, and without notice, takes it discharged of all the defences to which it might have been subject in the hands of a prior party. He takes it on the credit of what appears upon its face, and not upon the faith of its possessors' title. His title and right to recover under such circumstances is never doubted.

### QUESTIONS.

What kinds of property are specially mercantile? What are the means of acquiring and transferring title to shipping? By whom is the bill of sale executed? By what is the purchase consummated? What renders the ship an American vessel? Who are competent to register? What is the effect of sale without registry? Where rests the power of legislation in reference to shipping, and under what authority? What provision as to recording? How can the sale of a ship at sea be effected? What is it subject to? What are the rights of part owners of vessels? How regarded as to repairs and necessities? How can creditor preclude himself from looking to all the part owners? Who are liable for torts or wrongs? Who for wilful or malicious acts? When can a Court of Admiralty interfere, and with what effect? How far does its power extend? Where there is no conflict of opinion who may manage the property, and how, and with what effect? Who may occupy the position of owner? What is Good Will, and when do questions concerning it arise, and what are they? What the rule in professional partnerships? What in mercantile? How can a right to Trade Marks be acquired? What must they be? What is the usual remedy? What is required to be shown to secure the relief? What gives Negotiable Paper its peculiar mercantile quality? In what does it specially consist?

## BOOK II.

### P E R S O N S .



#### CHAPTER I.

##### T H E   S O L E   T R A D E R .

§ 13. THE occupation of *Trader* or *Merchant* has a character far less distinctive in this country than in England. With us every man is a *Trader*, not only who carries on trade and traffic as a business, but who does any act upon which any of the rules of mercantile law operate, so far at least as that act is concerned. Even the drawing a bill of exchange makes the drawer, as to that bill, a *Merchant*.

§ 14. So vigilant is the law in guarding the rights of individuals and communities, that it will not permit a trader to divest himself of the right of carrying on anywhere his trade or occupation. Any contract, although resting upon a sufficient consideration, by which a man precludes himself either from carrying on any trade, or any particular trade any where, is void, as being against public policy. A contract in partial restraint of trade may be enforced ; but the limits within which it is to operate, must be reasonable, and such as barely serve for adequate protection to the other party. A merchant may, for a sufficient consideration, sell to another his right to carry on trade within certain defined limits ; but those limits must be such as the purchaser reason-



ably requires for his own protection, and this must be made out by the party seeking to enforce the contract, as the law, *prima facie*, renders all such void.

§ 15. The sole trader may labour under such disabilities as may entirely prevent, or essentially impair, his right to carry on his trade. These are

1. *Alienage*. An alien friend, or subject of a power at peace with this country, is under no such restrictions, as regards Personal Property, that will prevent him from carrying on here his trade and occupation. But an alien enemy, or one whose country is at war with this, and a resident here, although permitted by courtesy to sue and be sued as in time of peace, would yet find too many obstacles in the way of carrying on any trade or business.

The second legal disability is *Infancy*; but the acts and transactions of an infant trader, or one under twenty one years of age, may be ratified, and thus rendered valid after arriving at majority.

The third is *Marriage* on the part of the wife; in which, at common law, there not only exists the incapacity to do any act that may be legally binding, but also the further incapacity of any subsequent ratification that will have that effect. In some of the States, as in that of New York, legislation has not only given the capacity of receiving and holding Personal Property, but also of trading and carrying on any branch of business.

### QUESTIONS.

Who is a trader? How is a contract in general restraint of trade as to validity? How of partial? What necessary to render it valid? What is the first disability? To what kind of alien particularly applicable? What the second disability? How acts done under it legalized? What the third? Wherein does it differ from the second? What in some of the States have removed it, and how far?

## CHAPTER II.

## PARTNERSHIP AND PARTNERS AS COMMERCIAL PERSONS.

## PART I.

## A PARTNERSHIP WHAT, AND HOW FORMED.

§ 16. A partnership results from a contract by which "two or more persons agree to combine their property or labor for the purpose of a common undertaking, and the acquisition of a common profit." The power it gives to one partner over the fortunes of all the others, renders it important to determine when that relation really exists, as the attempt is often made to realise its benefits without subjecting to its liabilities. This originates the inquiry as to its manner of formation, and what features in a contract are essential in its creation.

§ 17. The important feature is the stipulation for a *community of profit*. Although that of *freedom from loss* will be good as between the parties, yet it will have no effect on the liability to third persons. The nature of the contribution, whether of capital stock or services, does not vary the result. No partnership can legally arise unless the idea of profit enter into it as an element. Thus each contributing a sum for a joint purchase after which there is to be a proportional distribution among the contributors is no partnership. To create *that* there must be a *re-sale*, out of which may arise a profit. But a joint contribution to carry on a manufactory, with an agreement for a pro-rata division of the manufactured articles, will create a partnership without a sale, because the element of profit is there apparent. *Musier v. Trumpbour*, 5 *Wend.* 274.

§ 18. The participation in the profits to constitute a partnership must have this qualification, viz., it must be a

sharing in them *as a principal*, and not as *an agent* or *servant*. A practice among business men, not unfrequent, is for one to furnish all the necessary capital, and another his services receiving a compensation according to the amount of profits that may be realized. This often creates a difficulty in determining whether it be a partnership or an agency. The former is created wherever a party has stipulated for a share in the profits, as profits, so as to entitle him to an account and specific lien, or a preference in payment over other creditors, for he is then justly regarded as a principal, and entitled to all the benefits of a partner. But if the stipulation is for a remuneration in proportion to profits, or out of profits, even though they are net profits; without conferring any proprietary interest in the capital stock or accruing credits, or any such interest in the profits as to entitle him to demand an account, it is a mere agency. *Buckle v. Eckhart*, 3 Comst. 132.

§ 19. To the formation of all partnerships, where no power to the contrary is contained in the articles, the mutual assent of all the partners is essential. Hence, although one partner may form, with a third person, a sub-partnership, yet he cannot introduce any such into the partnership without first obtaining the consent of all the partners.

§ 20. The evidence upon which a partnership rests may be three fold; or there are three different modes of forming it.

1. By articles formally executed and delivered.
2. By a verbal agreement.
3. By the acts of the parties.

In case the first mentioned are resorted to, the parties should have inserted in them all the provisions and stipulations they desire enforced against their co-partners. But even where partnerships are sought to be formed and evidenced either by written articles or by a verbal contract, the acts of the partners, or the partnership, continued and sanctioned by themselves, will control the provisions of the

written instrument ; for it is a familiar principle in construing and giving effect to written articles, that they are to be read, especially in equity, as containing, or not containing, all those provisions or stipulations upon which the partners have, or have not, acted. It is, therefore, the course of action, and not original stipulation, that determines what is the real agreement among the partners. Such is the importance given to acts, that it is entirely competent for a person, not a partner, to render himself liable, as such, to third persons, by holding himself out as such, upon the strength of which they have been induced to act. But such holding out, although creating a liability to third persons who act upon the strength of it, fails nevertheless in rendering such person a partner, as there is still wanting the element of consent upon which alone he can be received.

### QUESTIONS.

What is a partnership? What important feature constitutes it? What one is essential to it? What important qualification? What creates a partnership as contradistinguished from an agency? What an agency as contradistinguished from a partnership? What is necessary to the formation of all partnerships? What different modes of forming it? What controls, where there are written articles? How are written articles to be read? How may a person, not a partner, render himself liable as such? Does such liability make him a partner?

### PART II.

#### ITS DIFFERENT KINDS—BOTH AS TO PARTNERSHIP AND PARTNERS.

§ 21. Partnerships may be formed for the prosecution of every legal branch of business. They may be formed for a series of operations in one or more kinds of business, or they may be limited to a single adventure. The number of partners has no necessary limitation. A species of partnership quite common in this country is what are termed JOINT STOCK COMPANIES. These come under the same general principles as all other partnerships except that

the great multitude of partners compels the adoption of certain peculiar regulations for the government of the concern.

§ 22. The manner in which these companies are formed ; the amount to be subscribed ; the number of shares of stock ; the mode of transfer ; all the provisions and stipulations deemed necessary, are embraced in the articles entered into between the stockholders. These regulate the right of the members among themselves. The management of the affairs of the company is confided to the directors and their agents. They make the calls upon the unpaid shares, and these may be made to take effect *in futuro*. \*A member of the company is entitled to the benefit of all its contracts, and responsible for engagements made by its agents, for purposes contemplated in its formation. His liability commences with the commencement of the company, and he is not responsible for contracts made before that period by its intended members or directors, while any preliminaries are unaccomplished, the performance of which formed the condition upon which he agreed to join. Even the members of a provisional committee do not, by being such, authorize the other members to pledge their credit for things necessary to establish the company. The publication of their names as such members will not render them liable. Where, however, they have done acts in relation to the proposed company, a foundation is laid upon which to ground a liability. Without a power to that effect given in the articles, one member cannot bind the others by negotiable instruments. So, also, as the general power to contract is through the medium of directors or agents, the contract of a private member would not bind the others, except so far as recognized and adopted by them. In the absence of any special provision, the liability of a member is determined in the same manner as that of an ordinary partner.

§ 23. The legislation of New York and several other States has authorized the formation of *Limited Partnerships*, which consist of one or more persons who are held out to

the world as the real ostensible partners, and who are the active business parties in its concerns, and who encounter the liability of ordinary partners, while one or more others are permitted to put into the concern a certain amount of capital, and to have their liability to the partnership creditors limited to the sum actually contributed. Their names are not to appear in the firm, nor are they to transact business on its account. Several special provisions are prescribed by statute, all which must be strictly and literally complied with, or the limitation will cease, and all will become liable as general partners.

§ 24. There are three different kinds of partners.

1. The *nominal*, who has no actual interest in the business or profits, and therefore is no partner as between themselves; but as to third persons he assumes the responsibility of a partner by voluntarily suffering his name to appear as such, thus lending the partnership the sanction of his credit.

2. The *real, ostensible*, who is, and appears such, to the world; and who, as such, takes all its benefits and risks.

3. The *dormant* or *concealed*, who is a real partner as to actual participation in its benefits, but who endeavors to avoid its risks and liabilities by keeping the fact of his interest concealed. His name does not appear in the firm. In the view of the world he takes no interest in its concerns. He seeks the benefit of the *Limited Partner* without encountering his trouble and risk. The result of this is, that so long as he can keep perfectly concealed, he avoids all liability to the partnership creditors. But, if his name becomes disclosed, and his interest known, he becomes equally liable as the other partners, whether the creditor trusted the firm upon the strength of his membership or not. His liability in such case is grounded not on the credit given, but on the contract between him and his co-partners, by which he really becomes a member of the firm, and hence liable for its debts.



In addition to these is the *Limited Partner*, who is a creature of legislation.

### QUESTIONS.

What branches of business may partnerships be formed to prosecute? How is the formation, stock, mode of transfer, and other provisions of joint stock companies, regulated? To whom is the management of such confided? What are the members entitled and subject to? When does the liability commence? For what is he not responsible? Are members of a provisional committee liable for the acts of other members? Does the publication of their names, as such, render them liable? Do their acts, as such? What power of members to bind by negotiable instruments? What by other contracts? How is the liability determined? What authorizes the formation of limited partnerships? What do they consist of? Wherein is the limitation? What is the risk incurred by not following strictly the statute provisions? How many kinds of partners? What the *nominal*, the *ostensible*, the *dormant*? What the rights and liabilities of each? On what are the liabilities of the *dormant* founded?

### PART III.

THE RIGHTS AND LIABILITIES IT CONFERS AND IMPOSES UPON EACH PARTNER AS AGAINST, AND IN FAVOR OF, THE OTHERS.

§ 25. The proper understanding of the law of partnership requires the recognition of three legal entities, and three sets of relations: these are

1. The *Partners themselves*, and the relations between each other, growing out of the partnership.
2. The *Partnership*, and the relations between it and the partners, and between it and third persons.
3. *Third Persons*, and the relations existing both between them and the partnership, and between them and the partners.

§ 26. The establishment of the partnership clothes the partners with new powers, and devolves upon them new duties, having reference both to the partnership fund, and to their duties, rights, and remedies, as against each other. To the first they bear the relations of joint tenants without

right of survivorship. While the tenant in common can only sell and convey the interest belonging to himself in the common property, the partner may dispose not only of his proportional interest in the joint stock, but also of the interest of all his co-partners, and thus give a perfect title to the purchaser.

§ 27. The courts have experienced a difficulty in affixing a limit to what may constitute partnership stock. This has more especially occurred in regard to real estate, which differs so essentially from personal in its nature, destination, and the legal principles upon which its enjoyment and transfer depend. It is now considered that when purchased with partnership funds, and made use of for partnership purposes, it is, in equity, chargeable with the partnership debts, and with any balance which may be due from one partner to another, upon the winding up of the affairs of the firm. And that, as between the personal representatives and heirs at law of the deceased partner, his share of the surplus of such real estate which remains after paying the partnership debts and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate.

§ 28. Another limit to what may constitute partnership stock is found in the nature of the partnership agreement, as when it embraces only the profits that may accrue from a particular business. A party who is the owner of goods enters into an agreement with another, by which they each agree to make use of their joint efforts to effect a sale or sales, and divide between them the resulting profits. Such goods continue the property of the owner, and do not form a joint stock in which each has an interest. It is a partnership merely in the profits. It is the intention of the parties that is to determine what shall be the joint stock belonging to the partnership, and in which the partners may have equal rights.

§ 29. The amount or quantity of interest each partner

possesses in the stock business, and profits, is usually regulated by agreement. Where it fails to be so, the presumption is that the partners are entitled in equal proportions.

§ 30. The duties of partners towards each other enforce the utmost good faith. Neither can be permitted to stipulate for any private advantage at the expense of the others; nor can one place himself in a situation likely to give himself an interest, or even a bias, against the discharge of his duty. Each impliedly stipulates to devote himself to the partnership business, and hence one can neither charge the firm, nor any other partner, for any service rendered in the business of the concern, unless there is a special agreement to that effect, or such a course of conduct adopted and followed up by the parties as will lead to an inference of such an agreement.

§ 31. The agreement between the partners which originates the partnership, generally specifies the business to be carried on, or the thing to be done; the time of its commencement; the period of its continuance; the amount of capital stock, and the proportions to be advanced by each; the proportion of profits to which each shall be entitled; the respective duties to be performed by each (although that is unnecessary); and not unfrequently that accounts be annually taken of the debts and effects of the partnership, and the particular mode of winding up its affairs to be pursued upon its dissolution; consisting either in converting the effects into money, and distributing among the partners in proportion to their respective interests, or by the transfer of one partner's share to the other at a valuation stipulated, or to be ascertained by a proceeding therein specified. Sometimes the agreement provides, that in the event of death the executor shall continue the partnership with the survivor for the benefit of the heirs or next of kin of the deceased partner, and in such case the executor must either renounce or comply with the provisions of the will, in

which latter case he subjects himself to all the personal liability of a partner.

§ 32. During the continuance of the partnership, partners can very seldom bring an action at law against each other. One partner may bring such action against another in a case of breach of covenant, or to recover money advanced before the partnership and in order to its formation. So also for work done for a firm before he became a member of it. So also where there has been a settlement, balance struck, and a promise to pay. So also on transactions that are separated and form no part of the joint account, and on the negotiable paper of his partner, although for value received on the partnership account. But the rights and remedies of partners against each other in reference to all matters growing out of, or connected with, partnership transactions, unless in a few very special exceptions, are enforced and pursued in courts of equity, which afford superior facilities for dissolving and winding up the affairs of a partnership.

#### QUESTIONS.

What are the legal entities and sets of relations involved in a partnership? How do partners stand related to the partnership fund? What interest does a tenant in common convey? What a partner? Under what circumstances, and for what may real estate be chargeable as partnership stock? How considered as between personal representatives and heirs at law of the deceased partner? What limit to partnership stock growing out of the nature of the agreement? What does agreement regulate as to amount or quantity of interest? What is the presumption when not so regulated? What do the duties of partners enforce towards each other? What implied stipulation by each? When can one charge another for services rendered? What are the general stipulations contained in a partnership agreement? When may one partner bring an action at law against another during the continuance of the partnership agreement? Where are the rights and remedies of partners against each other generally pursued?

## PART IV.

THE RIGHTS IT GIVES TO THE PARTNERSHIP, AND TO PARTNERS, AGAINST  
THIRD PERSONS.

§ 33. The contract entered into between the partners creates a legal entity—the *partnership*. This entity, like the corporation, has, for many purposes, a distinct legal existence separate from every other, and possessing rights recognized in courts of law and equity. It is in virtue of this that it becomes clothed with a mercantile character, and assumes duties and responsibilities, and to enforce rights much the same as a natural person. It is, therefore, important that it should have a *name* in which its books should be kept, and its business transacted. It is of little importance what it is—whether it be that of one of the partners, or a combination of a part or the whole of theirs.

§ 34. A fact illustrating the individuality and separate entity of the partnership is found in the principle, that when a security is executed to a partnership by its firm name, as a bond of indemnity for the faithful performance of duty by a clerk, any change in the partnership and in its name, will render the security inoperative as to all events occurring subsequently to such change.

§ 35. A partner borrowing money of another for the partnership, although he converts it to his own use, renders the partnership a debtor to the lender. Borrowing money on his own credit, although he applies it to partnership purposes, renders himself, and not the partnership, the debtor. Borrowing it in the course of the partnership business, without specifying for whom, and applying it to partnership purposes, enables the lender to look to the partnership as his debtor. One partner selling the goods of the partnership, although he misapplies the proceeds, will be held to have given a good title to the vendee. But one partner cannot apply the partnership property to the payment of

his own separate debt without the assent of his co-partners, even although the creditor was ignorant that he was receiving partnership property. It is a mere question of right, and of property, and knowledge or ignorance cannot affect or vary the nature of the transaction. In a case within the statute of frauds, and hence required to be in writing, a guarantee given to a single partner may be available to the firm, where proof is adduced that it was given for the benefit of all. And even a guarantee without any address would enure to the benefit of those to whom, or for whose use, it was delivered.

§ 36. The rights of the partnership against third persons may be divested by the act of one of the partners. One partner may release a debt due to the firm. Payment to one partner of a partnership debt is a payment to all, and that even although made after dissolution, and with an agreement that another partner shall receive all the joint debts. One partner may give time to the partnership debtor, either directly, or indirectly, by taking his bill or note payable at a future day; or he may preclude the partnership from suing, by some act which would render it unconscientious in himself to do so.

### QUESTIONS.

What does the contract between partners create? What is the entity like? What does it possess? What assume? What should it have? What fact illustrates its individuality? Under what circumstances is a debt of the partnership created? Under what a debt of the partner? Can a partner apply partnership property to the payment of his separate debt? How if creditor is ignorant that it is partnership property? Can a guarantee given to a partner be available to the firm? How as to a guarantee having no address? Can a partner divest the partnership of rights against third persons? How? What is a payment to one partner? Can one partner give a partnership debtor time directly? Indirectly, how? How preclude the partnership from suing?

PART V.

THE RIGHTS IT GIVES TO THIRD PERSONS, BOTH AGAINST THE PARTNERSHIP, AND THE PARTNERS.

§ 37. This involves the inquiry as to how far one partner can bind his firm, so as to give rights against it to third persons. The general rule is, that "*each partner is the accredited agent of the rest, whether they be active, nominal, or dormant, and has authority as such to bind them, either by simple contracts, respecting the goods or business of the firm, or by negotiable instruments circulated in its behalf, to any person dealing bona fide.*" To such an extent is this rule carried, that where two firms have a common partner, and a common name, each one is competent to bind the other to the payment of negotiable securities, drawn, endorsed, or accepted in that common name.

§ 38. The limitation is *to the mode of binding, which is by simple contract.* One partner cannot bind the firm by a deed, or in general by an instrument under seal. But this rule has its exception and limitation. The release of a partnership debt under seal, which a partner may legally do, presents the exception. The limitation or modification is found in the principle permitting one partner to bind the firm by an instrument under seal in its name and for its use, when done in the course of the partnership business, provided the co-partners assent to the contract previously to its execution, or afterwards ratify and adopt it, and either may be done verbally.

§ 39. Another important limitation embraced in the general rule is, that *the contract must be respecting the partnership business.* The true construction of the rule is—that the act or assurance of one partner, made with reference to business transacted by the firm, will bind all the partners. Every man is presumed to know the extent of the partnership, with whose members he deals, and has therefore no

right to take a partnership engagement in a matter having no reference to the business of the firm, and not within the scope of its authority, or its regular course of dealing, without first obtaining the consent or authority of the firm.

§ 40. When these conditions are complete—the *business relating to the firm*—and *the third person acting in good faith*,—the partnership will be bound, although the partner may have acted in fraud of his co-partners. Having held him out to the world as a partner and accredited him as such, they are compelled to abide by his acts done within the general scope of the partnership transactions. Hence, if he purchase goods, such as might be used in the firm business, and then convert them to his own use, the firm must pay for the goods.

§ 41. The most dangerous power which a partner can exercise, in its effect upon the safety of the other partners, is by the making and issuing of negotiable paper on behalf of the firm. It is thus in the power of a partner, within the briefest period of time, to realize money on negotiable paper of a solvent firm, made by him, the paper having some time to run, and readily passing into circulation, and the firm will be left liable for its payment as soon as it matures. The necessities of trade and the peculiar nature of negotiable paper, preclude the affixing here of any legal limitations, that can be effectual to prevent it.

§ 42. All such paper, however, must be *in the name of the partnership*. An apparent exception to this is where a bill is drawn upon the partnership in its firm name, and accepted by one of the partners in his own name; it will still bind the firm, the acceptance being legally understood to be according to the terms in which it is drawn. Where the firm name is that of one of the partners, a bill or note negotiated in his name *prima facie* binds him individually, but extrinsic evidence may be adduced to show that it was made in the firm business, and taken as paper of the firm.

§ 43. The rule requires such paper to be negotiated not



only *in the name*, but also *on behalf of the firm*. Hence, where the business of the firm does not, in its transactions, require the agency of such paper, there is no implied authority to issue it, and the firm will not be bound by it. As illustrations of this, we may take partnerships entered into for farming or mining purposes, or for those that are professional, as medical or law firms. But in all these cases, the presumption against the implied authority may be rebutted, by showing either that the constitution and particular purposes of the firm are such as to render it in their individual cases necessary ; or that, though not necessary, it is in other similar cases usual.

§ 44. Another limitation embraced in the rule is, that the *third person* who deals with the partner on the behalf of his firm *must deal in good faith*. If he either knew that the partner was not authorised, or had good reason to doubt his authority to bind the firm, he can hold only the partner contracting, not the other members. Negotiable instruments, although given in the firm name, cannot be enforced against it by any party, who is guilty of fraud in receiving them, or who took them knowing that they had been so fraudulently received, or even without knowing it, unless he gave for them a valuable consideration. It is not usually the business of a firm to guarantee the debts of others by endorsement or otherwise ; and hence all such endorsements, although in the name of the firm, are void, unless in the hands of a *bona fide* holder.

§ 45. One partner cannot bind the firm by a submission to arbitration. But he may pledge, as well as sell, the partnership effects. He may give or receive notice for the firm. He may render it liable for fraudulent acts, if done in the prosecution, and within the scope, of its regular business. So also an acknowledgment of a debt by one partner and a promise to pay it, if done during the continuance of the partnership, is equally as effectual to take a debt out of the statute of limitations as if done by all

the firm. But in most of the States this power ceases with the partnership, on the ground that no power to create any new right against the partnership can, after its dissolution, be exercised by any partner. *Bell v. Morrison*, 1 *Peters*, 351. *Van Keuren v. Parmelee*, 2 *Comst.* 523.

§ 46. The right given to third persons by the valid creation of a debt against the partnership is *both joint and several*. Not only is the partnership stock and effects liable to be applied to its payment, but each partner is also liable to have all his own separate property applied to the same purpose. The insolvency of the firm, or of one of the partners, may, therefore, give rise to conflicting claims between creditors. This conflict equity adjusts by applying the partnership property to the payment of the partnership debts, and the separate property of the partner to that of his individual debts. Before, therefore, a partnership creditor can reach and apply the separate property of the partner to the payment of his debt, he must first exhaust that of the partnership; after which he is entitled to have applied towards its satisfaction any surplus of property of the partner remaining after his individual debts are all paid. So also in the carrying out of this principle, a judgment obtained against a partner upon his individual debt, and execution issued thereon, will first be levied upon the separate property of the partner, and next a sale may be made under it of the partner's interest in the partnership property, that interest being what remains as his share upon distribution of the partnership property after the payment of all the partnership debts. 3 *Kent's Comm.* 65.

#### QUESTIONS.

What is the general rule as to the right of each partner to bind the firm? How, where two firms have each a common partner, and a common name? What limitation as to the mode of binding? How by deed or seal? What exception? What limitation or modification? What limitation as to partnership business? What presumption as to those

dealing with the firm? What the rule, where partner has acted in fraud of his co-partners? What the illustration? Wherein is found the most dangerous exercise of power by one partner as regards the firm? How must negotiable paper be executed to bind the firm? What apparent exception? What rule, where the firm name is that of one of the partners? What, besides the firm name, is necessary to hold the firm on negotiable paper? What illustrations? How presumption rebutted? How must third person deal to hold the partnership? When is the partner, and not the partnership, holden? When is negotiable paper in firm name not enforceable against it? What is the firm liability on the guaranty of another's debt? What is firm liability, on submission by partner to arbitration? On pledge? Notice? Fraudulent acts? Acknowledgment of debt and promise to pay? How, after dissolution of partnership? What right is given to third persons by partnership debt in their favor? What may give rise to conflict between creditors? How adjusted by equity? How partnership property first applied? How separate? What the rights respectively of partnership and individual creditors in equity?

#### PART VI.

DISSOLUTION—ITS CAUSES. ITS CONSEQUENCES. WHEN COMPLETE.

§ 47. A partnership may be dissolved

1. By lapse of time, as agreed upon in the contract.
2. By completion of the business embraced in the contract.
3. If no time of continuance be agreed upon, and the business has no natural termination, being successive in its character like mercantile pursuits, it is then a partnership at will, and either one of the partners may, in a moment, dissolve it, without incurring any liability to the others.
4. By mutual consent of the parties.
5. By insolvency of the partnership and sale of its effects.
6. By insolvency of one of the partners and sale under execution of his interest in the partnership stock.
7. By a valid assignment by one partner of the partnership effects, or of his own separate property and interest in the partnership effects.

8. By the death of either one of the partners.

9. By the marriage of a *feme sole* partner.

10. By the voluntary act of either partner. It has been made a question, whether one partner, against the will of the others, can dissolve the partnership connection before the time specified in the articles has arrived. It is now very well settled that he may do so, as it may be his only means of escaping utter ruin; but he does so at the risk of subjecting himself to the payment of all the damages his co-partners may sustain as a direct consequence of the exercise of this right.

11. By a judicial decree of the court of chancery. This will only be upon sufficient cause shown, and that sufficiency must in many cases rest in the sound discretion of the court. The following are some of the causes :

1. When the business, for which it was created, is found to be impracticable, and the partnership property is liable to be wasted and lost.

2. When the whole scheme of the association is found to be visionary, or founded on erroneous principles.

3. When the insanity of a partner, or his habitual drunkenness or other vices, render it impracticable to carry on the business.

4. Where the conduct of one partner is so grossly improper as to amount to an exclusion of his copartners from their proper agency in the firm, or such as renders it impossible to carry on the business according to the stipulated terms.

§ 48. As between the partners, the immediate consequence of dissolution is the cessation of the power of one partner to bind the firm by his acts. The relations between the partners and the nature of their interest in the joint stock, are at once changed. From joint tenants they become tenants-in-common, having only an undivided interest in the partnership stock, and no power even to control that interest except subject to the partnership rights. These

rights are first to have the partnership effects applied to the payment of the partnership debts, and the balance distributed among the partners, according to their respective interests and claims. The partnership may be said, in a qualified sense, to continue until its prior concerns are all wound up, but no partner has the power of imposing new obligations upon the firm, or of varying the form or character of those already existing. Even negotiable paper endorsed before the dissolution, cannot afterwards be put into circulation so as to bind the firm without the concurrence of all its members. The qualification exists solely in reference to the winding up of its concerns, and to the interest of each partner as tenant-in-common ; and is illustrated in the fact that the law permits each solvent partner to collect the outstanding debts due to the firm, adjust the unliquidated accounts, and give the necessary receipts and discharges to the debtors on payment.

§ 49. When the dissolution occurs through the death of one of the partners, the personal representatives of the deceased partner become tenants-in-common with the survivor ; but the survivor being alone liable at law to the partnership creditors, is entitled to the possession and distribution of the assets, to enable him to meet that liability. If, however, the partnership creditor is unable to realize his debt against the surviving partner, equity will enable him to accomplish that object by proceeding against the estate of the deceased partner, if the same be solvent ; as equity regards the obligations of the partners as being several as well as joint. The English rule even permits this resort to the estate of the deceased partner, before exhausting the remedy against the survivor, but in this country, and in New York especially, this rule is repudiated. *Lawrence v. Trustees, &c., 2 Denio, 577.*

§ 50. One direct consequence of the dissolution, is the necessity imposed by it of taking prompt and effectual steps to wind up all the partnership concerns. With this view

some disposition must be made of the partnership effects. If the partnership agreement had provided that the effects on hand at its dissolution should be taken by one of the partners at a valuation according to a prescribed mode, then the business might go on without any interruption; and this, more especially in the case of manufacturing establishments, might be a matter of great convenience. But if the agreement contains no such provision, and the partners can make no arrangement between themselves, neither law nor equity has any other possible mode of disposing of the property than by a public sale to the highest bidder, and a distribution of the proceeds as before indicated.

§ 51. The dissolution of a partnership, as regards its own members and the public, comes under different principles. So far as concerns its own members, it may be immediate and effectual, but in reference to the public, the element of notice comes in for consideration. The inquiry, therefore, becomes important, *in what cases*, and *how*, notice may be so given as to *render the dissolution complete*, and thus prevent one partner from having the right of continuing to pledge the liability of the firm. In several of the modes of dissolution mentioned, a firm may be bound, notwithstanding its dissolution, by a contract made by one partner in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, having had no notice of its dissolution.

§ 52. When a single partner, other than a dormant one, retires from the firm, he must see that the requisite notice is given, or his partnership liability will still continue. The continued use of the old partnership name, with his assent, will continue his liability notwithstanding notice. But such use, without his knowledge or assent, would not render him liable, as persons dealing with the firm are bound to inquire who constitute it. A dormant partner may withdraw without giving public notice.

§ 53. When a partnership expires by its own limitation,

or is dissolved by operation of law, no public notice is necessary. It is then a fact of which the public are bound to take notice.

§ 54. It was once made a question, whether, in case of a dissolution occurring by the death of one of the partners, a notice is necessary to prevent the continued liability of the property of the deceased through the acts of his surviving partners. As now understood, the death itself is sufficient public notice, and no other is required.

§ 55. A partner, by his own act, dissolving the partnership, or retiring from it, to avoid partnership liability in the future, should immediately give notice in two different modes :

1. He should publish a notice of dissolution in one of the usual advertising newspapers of the place where the business was carried on. That is sufficient as to all those who have not had previous dealings with the firm.

2. As to all those who have had such previous dealings, actual notice should be given to them of the dissolution. By these means the dissolution may be rendered complete as to the immediate parties and also to the public.

### QUESTIONS.

What are the different modes by which a partnership may be dissolved? When by the voluntary act of the partner before its stipulated termination, what risk or liability is incurred? In what cases may it be dissolved by judicial decree? What, as between the partners, is the consequence of dissolution? In what sense may the partnership be said to continue after dissolution? For what purpose may it so continue? What may each solvent partner do after dissolution? What may he not do? When the dissolution occurs by the death of a partner, what are the relations of his personal representatives with the surviving partner? What are the surviving partner's liabilities, and what is he entitled to? What remedy does equity give, and why? How may the partnership concerns be wound up? How, if wound up by the law? What must a retiring partner do, to escape future liability? How in case of a dormant partner? What rule, when partnership expires by its own limitation? What, when by the death of a partner? What are the modes of giving notice when a partner retires, or by his own act dissolves the partnership?

## CHAPTER III.

## CORPORATIONS AS COMMERCIAL PERSONS.

THE immense amount of property now embarked in Banking, Insurance, Manufacturing, and Railroad Corporations, gives an importance to this subject scarcely inferior to any other at the present day. But as corporations aggregate only possess a mercantile character, the attention will be limited entirely to them.

## PART I.

## WHAT THEY ARE, AND HOW CREATED.

§ 56. A corporation aggregate consists of a franchise, or special right or rights, possessed by several individuals, who subsist as a body politic, under a special denomination, and are vested with the capacity of perpetual succession, and of acting in many respects as a single individual. It is peculiarly a creature of the law, existing only in legal contemplation, and deriving from its policy not only its being, but all its powers and capacities. The object contemplated is to bring vast amounts of capital, for purposes more gigantic than individual enterprise could hope to accomplish, under the dominion of an entity created and controlled by the law. It is said to be immortal, invisible, and intangible; but its immortality means only its capacity to take in perpetual succession so long as the corporation exists.

§ 57. Although it may be competent for corporations to exist in this country by prescription, which presupposes a grant, yet almost the only mode by which they are created is by legislative act. The power thus to create is possessed and exercised by both the state and federal legislatures. It is exercised by a grant, and embodied in the charter, but



this requires an acceptance in order to create a corporate body. This may, however, be inferred from the acts of the majority of the corporators—the persons receiving the charter,—thus dispensing with a written instrument, or even vote of acceptance. The charter once accepted is regarded as a contract between the State and the corporators. *Trustees of Dartmouth College v. Woodward*, 4 *Wheat*. 518. It is from this standpoint that the rights of corporations are shaped, and their freedom from subsequent legislation derived. No legislation can impair the obligation of contracts; and hence, unless the right is reserved in the charter, corporations, once created, are independent of the legislature. This has led very generally to the introduction of a provision into the act of incorporation giving the right to alter, amend, or repeal the act at pleasure. The practice is now becoming quite common in many States of passing general acts of incorporation, under which companies may organize, and thus derive all the benefits of an incorporation without the necessity of special legislation. In this way all banking and manufacturing corporations are now formed in New York.

### QUESTIONS.

What is a corporation aggregate? What the object contemplated in its creation? What its qualities? What the mode of its creation? What the instrument by which it is created? What necessary to render the charter a valid act of incorporation? How may acceptance be inferred? How is a charter accepted regarded? How may the legislature change charters once granted? What the means generally resorted to that may reserve this power? How are banking and manufacturing companies formed?

### PART II.

#### THEIR POWERS AND LIABILITIES.

§ 58. The powers possessed by corporations have been briefly summed up in the “capacity to have perpetual succession, under a special denomination, and an artificial form,

and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities." The inquiries that a business man is chiefly interested in making, concerns the organization and exercise of the power by which corporate action is directed and controlled; the contracts they are capable of making and how they may be evidenced; and the limits and extent of corporate liability. There are many kinds of corporations of which he needs to know little. The only two that will be likely to engage his attention in the way of business are those organized for governmental purposes and stock corporations.

§ 59. The governmental, or first mentioned, are generally termed *quasi corporations*, and possess a corporate capacity only for particular, specified ends; but whose corporate powers are perfect for all the purposes of accomplishing those ends. These are of statutory creation, and in New York their illustrations may be found in the different counties in the state, the supervisors of a county, the supervisors of towns, overseers of the poor, trustees of school districts, and several others of a similar character, who may hold and transmit public property, and do many corporate acts, having corresponding corporate powers and attributes. Each one of these several bodies of men may sue and be sued in their corporate capacity. Both towns and counties generally through this country are bodies politic for certain purposes; and these, and others of a similar character, possess sufficient corporate powers to answer all the purposes for which they exist, without having, in any other respect, the capacities incident to a corporation.

§ 60. The stock corporations, in vastness and importance, overshadow every other. Such are banking, insurance, manufacturing, turnpike, bridge, and railroad companies. All such are creatures of the legislature, and though private as to ownership and control, are nevertheless incidentally public, as affording facilities not otherways to be enjoyed.

§ 61. In all corporations of this character the important point of inquiry is—What are the rights, powers, and liabilities contained in the charter? The charter is to the corporation, what the constitution is to a State—its fundamental law. The same rule of construction is adopted in both cases, viz., that no other powers can be exercised by the legislature in the one case and the corporators in the other, than those which are either expressly delegated, or which are necessary to carry into effect those which are so delegated.

§ 62. The rule in regard to these powers is that they shall be construed strictly. A corporation is bound to show its authority for the business it assumes to do. Its powers are also confined to the jurisdiction creating it, and hence where one State authorized the erection of a bridge, one end of which extended into another State, the corporation could not collect toll of those who passed only the part of the bridge situated in the other State. *Middle Bridge Corporation v. Marks*, 26 *Maine*, 326. The acts of corporation agents are also subject to the same rule, and hence a deed signed by the president and cashier, and sealed with the corporate seal, was held of no effect, if affixed without the authority of the directors. *Hoyt v. Thompson*, 1 *Seld.* 321. So also corporations cannot bind themselves for purposes foreign to those for which they were established; and although one created for the purposes of trade may exercise as incidental, the power to accept bills and issue notes, yet it may be well doubted whether one for a mining, or any other purpose, not of trade, possesses any such power.

§ 63. The power of making by-laws is incidental to a corporation. They may be made either by the corporators, or any lesser body to whom they may delegate the power, unless the charter contain specific directions. The charter usually vests it in the board of directors. The by-law is to the corporation what legislation is to the State. The rules in relation to it are—

1. It must be reasonable.
2. Strictly within the limits of the charter. .
3. In subordination to the constitution and general law of the land.

§ 64. In cases within its chartered powers, it is the act of the majority that binds the whole ; that majority being the major part of those who are present at a regular corporate meeting. Where, however, the act is to be done by a definite body as a board of directors, a majority of the board must be present, and then the ultimate decision may rest upon a majority of the quorum. Although in joint stock corporations it is competent to remove an officer upon sufficient cause shown, yet no stockholder can be disfranchised by any act of the corporators, without at least an express authority contained in the charter, as that would deprive him of his interest in the general fund.

§ 65. In all joint stock corporations the board of directors, for all business purposes, is the corporation ; and hence its acts in reference to the corporate property and corporate transactions are taken as corporate acts. The stockholders, who are the corporators, elect the directors, and then the law devolves the business to be done upon the board. This business cannot be done by the directors acting separately and individually. It is the board regularly assembled, and having present its quorum ; and then only can its act be that of the corporation. A conveyance executed under the hands and seals of the directors or trustees, would not convey the property of the corporation. To do that, it should be executed in the corporate name, and have affixed to it the corporate seal by the president or other officer authorized to do it.

§ 66. Another important inquiry relates to the powers of joint stock corporations in the making of contracts—the character of contract they are authorized to make, the mode or manner of making it, and how it may be evidenced. One question of great importance has been raised and

settled in this country ; and that is, whether a corporation has a legal existence, for any purpose, out of the boundaries of the sovereignty by which it was established, and hence whether a contract made in another State was enforceable by the laws of that State. It was held that a contract thus made, was valid and enforceable, provided it was authorized by the charter, and permitted by the laws of the State in which it was made. *Bank of Augusta v. Earle*, 13 *Peters*, 519.

§ 67. A corporation can make no contract which will apply its funds to any other objects than those specified or plainly implied in its charter ; and hence where two Railroad companies, without legislative authority, uniting by agreement, bought a steamer as part of the plan, giving a note as by the new company thus formed, both that and the whole contract were adjudged illegal and void. *Pearce v. Madison & Indianapolis Railroad Co. &c.*, 21 *Howard*, 441. The tendency, however, has, for a long time been, and still is, to hold corporations liable for transactions and liabilities incurred beyond the powers expressly granted in the charter, provided they could, by any reasonable intentment, be brought within the implied powers, or those incidental to the express ones ; and hence the power to make loans and receive securities therefor, and to issue negotiable paper creating a liability thereon, has been recognized by the courts.

§ 68. The early common law doctrine was, that corporations could contract only through their common seal, which was received as the only evidence of their assent. Progress in the mercantile world soon rendered the strict observance of this rule impossible, and it became so far relaxed, that a corporation was permitted, by a mere vote, to appoint an agent, whose acts and contracts within the limits of his authority, would be binding. At last in this country the old technical rule was entirely laid aside so far at least as related to corporations created by statute, the business of

which was to be transacted by a board of directors. In its place was adopted the sounder and better rule, that "whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol or verbal contracts, made by its authorized agents, were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay." 2 *Kent's Com.* 289. Corporations may now bind themselves by implied as well as express contracts, and by such as may be deduced inferentially from corporate acts, without either vote, or seal, or deed, or writing.

§ 69. Neither, in the case of ordinary contracts, need the agent be appointed under seal, nor even by vote of the corporation; but his acts, as agent, known to, and recognized by the board as such, will render the corporation liable to the same extent as if there had been a regular formal appointment.

§ 70. But in whatever way agents may be appointed, or however evidenced their appointment or acts, or contracts, corporations can be bound only by such as are done and made within the scope of their authority. This applies not only to the agent, but also to the powers exercised by the corporation, as the latter cannot be made liable for the acts of its agents, which are clearly not within its corporate powers, although they may be ratified by the directors.

§ 71. Corporations are generally held liable for the negligence and unskilfulness of their agents in all matters coming legitimately within the scope of their powers. But a different rule prevails where such matters are without their powers; and hence where a bridge was so negligently constructed by the agents of a municipal corporation that it fell and injured the plaintiff, it was held that he had no remedy against the corporation, the act under which it was erected being unconstitutional. *The Mayor, &c., of Albany v. Cunliff*, 2 *Comst.* 165.

§ 72. Another limitation of the liability of corporations relates to the agent's acts. They are not liable for such as are wilful and intentional on the part of the agent. And this rule embraces acts of such a nature that they might, under other circumstances, come within the scope of their powers and agency, and thus admit of lawful performance. The fraudulent issue of stock of a railroad corporation by its president and transfer agent, and coming by assignment into the hands of an innocent party, is void as against the corporation. *Mechanics Bank v. N. Y. & N. H. R. R.*, 3 *Kern*, 599.

#### QUESTIONS.

How may the powers of a corporation be summed up? What inquiries should a business man make? What two kinds of corporations are important for him to understand? What are governmental or *quasi corporations*? How created? What illustrations? What the measure of their powers? What are instances of stock corporations? How created? How as to being private or public? What is here the important point of inquiry? What is the charter, and to what analogous? What is the rule of construction? How construed? To what are its powers confined? How with corporation agents? What limitation as to purposes for which they are created? What is a by-law, by what power made, and what are the rules that regulate it? The act of what binds within chartered powers? What in a board of directors? How as to removal of officer? As to disfranchisement of member? How board of directors regarded in joint stock corporations? How their acts? Who are the corporators, and what do they do? When are the acts of the board those of the corporation? How must conveyance be executed to bind corporation? Is a contract made by a corporation in a State other than that creating it enforceable where made, and subject to what provisos? What is the limitation as to application of fund? What illustration? What is the present tendency? How effected? What instances? What was once the only mode of contracting? In what was the first relaxation of the rule? What is the present rule in this country? What kind of contracts may corporations now make? How may the agent be appointed in ordinary contracts? What limitation as to acts of agents however appointed? What applications? What liability for negligence and unskilfulness of agents? For what matters liable? For what not liable? What other limitation of liability? What acts embraced? What instance in illustration?

## PART III.

## ITS DISSOLUTION AND CONSEQUENCES.

§ 73. Municipal corporations, such as towns, counties, &c., which have been created for the purposes of government, are subject to being modified or dissolved at the pleasure of the creating power. These are in no sense a contract, but are simply the acts of the sovereign power, and in this direction find their only limit in the discretion that should accompany its exercise. Such modification or dissolution, however, cannot affect any vested right acquired during its continuance, unless the exercise of such right depend solely upon such continuance; as in case of the salary of an officer, which, being dependent upon the continuance of the office, terminates with it.

§ 74. As to joint stock corporations, they being contracts between the State and the corporators, cannot be modified or dissolved by a legislative act without a reservation to that effect. Such corporations may be dissolved—

1. By a voluntary surrender of their franchises into the hands of government, and an acceptance by some solemn act of the government.

2. By such abuse or misuser as will justify a forfeiture, and a judgment of forfeiture consequent thereon pronounced by a competent judicial tribunal. This must be a court of law, and not of equity; as the latter only enforces trusts, but never pronounces forfeitures.

§ 75. As to what acts constitute such abuse or misuser, courts have taken somewhat different views, and much will depend upon the particular phraseology of the statute creating the corporation. It is everywhere admitted that it possesses great tenacity of life, and that it is impossible to fix any very precise limit, which shall define the line of forfeiture. The suspension, for instance, of specie payment by a bank, has been decided both that it was, and was not,



such a non-user, or mis-user of its franchises, as to work a forfeiture of its charter. That it would work such forfeiture see *Planters Bank of Mississippi v. The State*, 7 *Smedes & Marshall*, 163. That it would not have that effect see *The State v. The Bank of South Carolina*, 1 *Speers*, 433. And where a manufacturing company sold all its property and effects, together with its charter, to a partnership, the members of which elected themselves trustees of the corporation, it was held no dissolution of it. *Wilde v. Jenkins*, 4 *Paige*, 481. But where the statute provides for the personal liability of stockholders, and the trustees or directors relinquish their trust, omit the annual election, and do nothing indicating a resumption of corporate functions, courts will presume a dissolution so far as creditors are concerned, and give them their remedy against the individual members. 2 *Kent's Comm.*, 311.

§ 76. The consequences of dissolution by the old common law were—that its real estate reverts back to the original grantor and his heirs—that the debts, to and against, are extinguished—and that all the personal estate vests in the people as succeeding to the rights of the government creating it. Since the creation of so many joint stock and money corporations, all this has become changed, and the sounder doctrine may now be stated to be—“that the capital and debts of such corporations constitute a trust fund, and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it is fully collected and applied.” 2 *Kent's Comm.*, 9th Ed., 375 *Note a*. Thus the principle applicable to the winding up of such corporations, is essentially the same as that which applies to partnerships. .

#### QUESTIONS.

How are municipal corporations modified or dissolved? Why? What is the limit of such modification or dissolution? What the possible exception and its illustration? How may joint stock corporations

be dissolved? By what tribunal? On what dependent? What is its tenacity of life? What limit difficult to fix? What illustrations? What the old common law consequences of dissolution? What the present doctrine, and to what is it analogous?



## CHAPTER IV.

### PRINCIPAL AND AGENT.

THE principles that regulate the relations of principal and agent, both as between each other, and as regards each and third persons, are among the most important in mercantile law. The number, extent, and variety of mercantile pursuits have called into existence this branch of the law, and moulded it to suit the requisitions, exigencies, and necessities of business.

#### PART I.

##### AGENCY WHAT—WHO MAY BE AGENT, AND HOW CREATED.

§ 77. An agency is the substitution of one for another in some matter of business. It is based upon a contract, either express or implied, by which one confides to the other the management of some business, to be transacted either in his name or on his account, and by which the other assumes to do the business and to render an account of it. In general whatever a man has the power to do in his own right, he may appoint an agent to do for him. The power, therefore, of appointing an agent is generally co-extensive with the capacity to do business on the part of the principal. And, if that capacity is limited, as in the infant and married woman, the power of creating an agent experiences a like limitation.

§ 78. So far as regards the person who may be appointed agent, the rule is very broad. Many of those who are incapacitated from doing business on their own account, as

infants and married women, may nevertheless be appointed agents. The act being in law that of the principal, no mere disability of the agent is attachable to it. The only limitation here is confined to those cases where nature herself has created the barrier—such as those of idiocy, imbecility and insanity. But in contracts requiring the exercise of discretion, one person cannot be agent for both parties, as where the agent of one insurance company reinsured another, of which he was director and secretary, acting for both, the contract was held voidable in equity. *New York Central Insurance Company v. New York & New Haven Railroad Company*, 4 Kern, 85.

§ 79. There are various modes of creating an agency. It may be in writing, and formally under seal, as by a Power of Attorney; or by informal writings, as by letter, instructions, memoranda; or it may be verbal, or by implication. It is only necessary to be formal and under seal where, as in the conveyance of land, the thing to be done must be evidenced by an instrument thus formal and sealed. And even here the authority *to contract* need not be in writing, but that *to convey* must. And in cases where, by the statute of frauds, the sale of goods must be in writing in order to be valid, the creating of an agency to sell may be verbal.

§ 80. An agency in mercantile pursuits is often created by mere implication, the authority being implied either from the conduct of the principal in sanctioning the credit given to a person acting in his name, or from the nature of the employment itself. The fact of employment is always evidence of authority in the person employed. An agent whose employment consists in buying goods for his principal with ready money, cannot subject him to a debt by buying on credit; but if his employment be to buy on credit, although the money to purchase was furnished him, yet he may misapply that, and charge his principal with the credit which he is accustomed to obtain. But where there has been no previous dealing on credit sanctioned by the

principal, there any trust given by a party is at his peril. He can then only look to the agent. This implied authority continues after the agency has actually ceased, unless the parties giving credit to it either had notice of the change, or from length of time or other circumstances, ought not to have inferred that it continued.

§ 81. An agency may also be created by implying an authority from subsequent acts of assent or acquiescence on the part of the principal. A contract is made for another without authority. Without some act or acquiescence of that other, it has no binding force upon him. But if, with a full knowledge of all the facts, he adopts it, he then makes it his own, and it has relation back to the time at which it was entered into. The best evidence of this adoption is his availing himself of any benefit resulting from it. This adoption of the agency in any one part, with full knowledge of the circumstances, operates as an adoption of the whole contract or act, for one part cannot be adopted, and the rest repudiated.

§ 82. This adoption may also be accomplished by remaining silent. It is the duty of such a principal, when his correspondent informs him of an act done for him, to express his dissent, and give notice within a reasonable time, or he will be bound by it. This, however, only applies where some general relations of agency already exist, and has nothing to do with the officious act of a stranger, which can never lay the party for whom it is done under any legal obligations, without some voluntary act on his part adopting it.

### QUESTIONS.

What is an agency, and upon what based? What may a man appoint an agent to do? What is the limit of capacity to appoint? Who may be appointed? Whose act is it when done? Where is the only limitation? What rule as to being agent for both parties? What different modes of creating an agency? When necessary that it should be formal and under seal? What difference here between the authority

*to contract* and that *to convey*? How created in a case within statute of frauds? How is an agency created by implication? What is employment evidence of? What illustrations? How long does implied authority continue? How implied from subsequent acts? What necessary to such implication? To what does it have relation? What the best evidence of adoption? What effect the adoption of one part? What the effect of remaining silent? What is the duty of the principal? Where does this apply, and where not?

## PART II.

## DIFFERENT KINDS OF AGENCY.

§ 83. An agency is either *Special* or *General*. A *Special* consists in a delegation of authority to do a single act. A *General* is such delegation to do all acts and things that are connected with a particular business or employment. Another division is into *Limited*, in which the agent is bound by precise instructions, and *Unlimited*, where he is left to pursue his own discretion. The first applies to a general agent, limiting and restricting his authority; the second to a special agent, leaving him limitless as to the particular means he may make use of in the exercise of his special authority.

§ 84. There are also different kinds of agents having reference particularly to commerce. These are—the *Factor*, who is an agent for the sale of property. He is, therefore, intrusted with the possession. And also, the *Broker*, who is an agent simply to negotiate sales. In his capacity of Broker he has not confided to him the possession of the property of which he negotiates the sale.

## QUESTIONS.

How is agency divided? What is a *Special Agent*? What a *General*? What is a *Limited Agency*, and to what does it apply? What an *Unlimited Agency*, and to what does it apply? What is the commercial division? What is a *Factor*? What a *Broker*?

## PART III.

## 1 EXTENT AND EXECUTION OF AUTHORITY.

§ 85. In giving effect to all written powers, such as Letters of Attorney, or of instruction, they are to receive such an interpretation as that the authority is never to be extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect. But while this principle is adopted, it should also be made to include all necessary or usual means of executing it with effect. A broker, for instance, who is employed to get a policy effected may adjust the loss, and do every thing necessary for procuring such adjustment. An agent employed to settle losses may refer a controversy about a loss to arbitration. An agent employed to get a bill discounted, may, unless expressly restricted, indorse the name of his principal, and bind him by such indorsement. So an agent when intrusted with property to sell, may, unless specially forbidden, bind the owner of it by a warranty given on the sale. There is an exception in the case of an auctioneer, who, as such, has no authority to bind the owner by a warranty.

§ 86. The extent or scope of an authority is to be gathered from the commission by which it is given, the construction of which may be assisted by resorting to the usages of trade. Such an authority empowers the agent to bind his principal by all acts within the scope of his employment, no matter what may have been his private instructions, not known to the party with whom he deals. This general authority arises from a general employment in some specific capacity, such, for instance, as a Factor or Broker.

§ 87. Strangers are governed, and have a right to be, by the acts of the parties, not by any private communications passing between them. Whatever amount of authority a principal by his acts and public declarations confers upon

a general agent he will be bound by as against all who base their action upon such acts and declarations. It is not in such case the authority actually received by the agent that is to guide. It is that which the principal allows him to assume. A banking corporation, for instance, are bound by notice of such matters relating to the ordinary business of the institution as are known to their cashier. *New Hope & Delaware Bridge Company v. Phoenix Bank*, 3 Comst. 156. An Insurance Company is bound by a notice to their travelling agent. *McEwen v. The Montgomery County Mutual Insurance Company*, 5 Hill, 101.

§ 88. The rule is different in the case of a special agent. Such an agency carries on its face a limitation, and that is sufficient notice to all dealing with such an agent, to put them on inquiry. They are, therefore, bound to ascertain the extent of his agency. But even here if the principal, by his act or declaration, authorizes the belief that larger powers are given than are actually conferred, and that belief is entertained and acted upon, it will determine the measure of his liability. The same rule applicable to a special agent applies equally where, from the nature of the appointment, it is evident the agent must be acting under an authority derived from a person who possesses merely a restricted authority, such, for instance, as an executor or administrator. *Owings v. Hull*, 9 Peters, 607.

§ 89. An agent or factor having a general power of sale is authorized by it to sell on credit when that is the usual mode of conducting that kind of business, although it may be, at the time, unknown to the principal. This has an exception in the case of an agent for a state.

§ 90. This rule, however, has a limitation to the disposition of property *by way of sale*. It does not include barter. Nor can a factor at Common Law make a valid pledge of the goods of his principal, although it be for the purpose of raising money to meet bills drawn on him for their proceeds. In those states, however, whose mercantile interests are

much advanced, the Common Law has been modified by legislation giving the consignee or agent all those powers relating to the consignment that are essential for his own protection.

§ 91. The authority of an agent to receive money due to his principal on a written security is limited to those cases in which the agent is himself in possession of the security. That is regarded as the best evidence of his authority, and hence without it, the debtor is not safe in paying the agent, although the money had been obtained through his instrumentality, and although on former occasions he may have received and paid over to the principal. There may, however, be sufficient authority given to supply the absence of the security, but the debtor before paying should assure himself of the one or the other.

§ 92. Where a known agent is intrusted with goods for sale, a payment to him, where no notice has been given by the principal to the contrary, discharges the debtor. But a broker, not having possession, has no such authority to receive, unless the custom of trade, or the usual course of dealing between him and his principal, fully justifies him in so doing. Where, however, the principal is undisclosed, he may bind by receiving payment, as he then stands in the place of the proprietor.

§ 93. The general principle is that a factor's sale creates a contract between the principal and the purchaser, so that a notice by the former to the latter not to pay the factor, will constitute a limitation on the factor's right to receive; except where the factor acts under a *del-credere* commission, or where a balance of account, equal to, or exceeding the amount paid, is due from the principal to the factor.

§ 94. Where the agent's authority is of sufficient extent to authorize his receiving payment, a *tender* to him has the same effect as if made to the principal. But a *tender* by an agent fails to discharge the principal without actual payment. An agent cannot, without special authority for that purpose, compound and discharge a debt due his principal.



§ 95. The rule is, that a special authority must be strictly pursued, but still a power to do any act is held to comprise a power to do all such subordinate acts as are usually incident to, or necessary to effectuate, the principal one in the best and most convenient manner. Hence, if the intention be to exclude any circumstance which would naturally fall within this principle, it must be evidenced by express directions. Thus to escape liability on a warranty made by the agent on the sale of an article, there must be express directions not to warrant.

§ 96. The extent of authority is liable to be varied by necessity. This applies more especially to masters of vessels, and occurs where unforeseen contingencies arise, and there is no opportunity of getting new instructions based upon them. In such and similar cases, the law vests a large discretion in the agent, and holds the principal bound for those acts which evince a sound exercise of it.

§ 97. The inquiry as to the proper execution of the authority involves the consideration of the person to execute, and the manner of executing. The person is the agent appointed by the principal. The general principle precludes the delegation of any authority by one agent to another of his own appointment, on the ground that the original delegation was a personal trust, and therefore neither assignable nor transferable. The original authority may, and generally does, contain the power of appointing a sub-agent, or the general usage of business may justify the employment of a broker for the negotiation of sales of merchandise. Persons deriving authority under a legislative enactment have no power of substitution. *Lyon v. Jerome*, 26 Wend., 485. A delegated act, which is merely mechanical in its execution, as the accepting of a bill, may be delegated to another.

§ 98. As to the manner of executing, one rule is that a special authority must be strictly pursued, and a very slight variance is such a departure as will render the act void at

the election of the principal. Thus an authority to sell at a particular price does not authorize to sell at a less price, unless the agent choose himself to make up the difference. An authority to sell by auction does not authorize a disposition by private sale. If the agent obtains better terms than are embraced in his instructions, his principal will be bound. His execution in part, as of the purchase of thirty shares of stock, his authority being to buy fifty, will be good to that extent. The major will generally include the minor, and hence a power to sell contains a power to mortgage, that being merely a conditional sale.

§ 99. The act done must be in the name of the principal, and not in that of the agent. A deed, if executed in the name of the agent, is no deed of the principal. It may be executed by signing the principal's name alone, or the name of the principal by the agent. There is some little relaxation of this rule for commercial purposes, so far as regards negotiable paper, but the agent should either sign the name of his principal to the paper, or it should appear on its face that it was in fact drawn for him, or he will not be bound.

### QUESTIONS.

What is the rule of construction as to Letters of Attorney, or of instruction? What do they include? What illustrations? What exception? What is the extent of the authority to be gathered from? How far does it empower the agent to bind his principal? What does general authority arise from? What are strangers governed by? What the principal bound by? What the test of authority? What illustrations? What the rule in the case of a special agent? What are those dealing with such bound to ascertain? What may the principal do here? What rule where the party appointing acts under restricted authority? What illustration? What does a general power of sale authorize, and in what case, and with what exception? What is the limitation of the power of sale? How is it as to barter and pledge? What is the limitation of authority to the agent to receive money, and in what case? What may supply the non-possession? In what case is a payment good by a purchaser? How in case of sale by brokers, and why, and what exception? How where the principal is undisclosed, and

why? What is created by a factor's sale? What effect has notice by the principal to a purchaser? What exceptions? When is tender to agent good? When by agent? When can agent compound and discharge debts? How must special authority be pursued? What does power to do an act comprise? What must be done to exclude any circumstance? What instance? How can authority be varied by necessity? How, or to whom applied? What does a proper execution involve? Who must the person executing be? How as to the power of delegation, and why? What should the original authority contain? What may justify the employment of a broker to sell? How, where the authority is derived from legislative enactment? How, where the act is merely mechanical? What is the effect of a slight variance in case of special authority? Illustrations what? An agent obtaining better terms? Execution in part? What instance of major including minor? In what name should the act be done? What effect if in the name of the agent? How should it be executed? What instance of relaxation? How should negotiable paper be executed by the agent?

#### PART IV.

##### DUTIES, LIABILITIES, AND RIGHTS OF THE AGENT.

§ 100. The agent is bound to obey instructions, and when explicit they preclude the exercise of any discretion. But when the thing to be done is such that two or more different modes of doing it, will answer equally well, he may choose either one, provided no other has been particularly prescribed. In the case of a simple consignment of goods to a factor, the consignor may, from time to time, control the sale. But if the factor has made advances or incurred liabilities on account thereof, he may, in the absence of any agreement to the contrary, sell so much of the consignment as may reimburse such advances, or meet such liabilities. But if the consignor offers to reimburse and discharge, it restores his ability to control. The principle established is—that, in the absence of all prior orders and agreements, the factor by making advances and incurring liabilities entitles himself to control the consignment with a view to reimbursement, unless the consignor chooses to restore his own power and authority to control by removing

the cause or occasion that has transferred it to the factor.

• *Brown v. McGran*, 14 *Peters*, 479.

§ 101. An agent may incur a liability to his principal beyond the repayment of the money and interest. If the money sent him to purchase a particular article, should be wilfully converted to his own use, and the article should subsequently acquire additional value, his disobedience of instructions might be punished by holding him responsible for the increased value of the article.

§ 102. An agent is bound to use all ordinary diligence and care in the execution of his trust. In the absence of specific instructions he must pursue the accustomed course of that business, in which he is employed. As he receives compensation for his services, he is bound to bring to his undertaking such a degree and amount of skill and knowledge as would, in ordinary cases, insure its successful accomplishment. Whoever holds himself out as ready, for a compensation, to transact a particular kind of business for others, is presumptively possessed of the requisite skill, and held responsible for its exercise. For instance, an agent is employed to negotiate bills of exchange; if he fails to procure acceptance, he should protest for non-acceptance, and immediately advise the principal.

§ 103. The agent's liability for negligence or neglect of duty is not limited to the direct injury occasioned to the property of the principal. He is also liable to make good all injuries which his own act, as agent, has occasioned to the property of others, and which the principal has been called upon to pay, and hence a verdict obtained against the principal for the act of his agent, is the measure of damages in favor of the former against the latter. An agent, however, is not liable for neglecting an act expressly directed, provided that, when performed, it would not have entitled his employer to any legal benefit, although it might have conferred a probability of advantage founded upon mere courtesy.

§ 104. An agent is not chargeable with a breach of instructions in three cases—

1. Where an unforeseen necessity arises, not originally contemplated by the parties.

2. Where the circumstances are such, that a strict compliance is rendered impossible.

3. Where a compliance would have been, in effect, the perpetration of a fraud upon others, and where, therefore, the plaintiff, in order to recover, must allege his own fraud ; as where an auctioneer is directed to put up property ostensibly to sell to the highest bidder, and yet not to sell it below a certain sum ; and the auctioneer strikes it off to the highest bidder, although below that sum. His instructions, if obeyed, would have been a fraud upon the bidders, and hence they were rightly disobeyed.

§ 105. In equity an agent cannot make himself an adverse party to his principal, on the ground that a man cannot there be permitted to defeat a trust which he has once accepted, and entered upon the performance of. The confidence, which should exist between the principal and agent, is highly regarded by a court of equity ; so much so, that it often interferes to set aside improvident grants made in favor of persons confidentially intrusted with the conduct and management of the property so bestowed. *Huguenin v. Basely*, 14 *Vesey*, 273. But this has no application to those agents who are merely employed as instruments in the performance of some appointed service, but only for those who are relied upon for counsel and direction, and whose employment partakes more of the nature of a trust than a service.

§ 106. A factor, or other agent, in the possession of property, is responsible to a reasonable extent for its safety and preservation. He occupies the position of a bailee for hire, and is bound to bestow the same amount of care and attention upon the goods of his principal, as he would under similar circumstances, upon those of his own. He is bound

to keep them with as much care as a man of *average prudence* would bestow in the keeping of his own.

§ 107. A very important subject of inquiry relates to the circumstances, under which an agent is bound to insure the property of his principal while it remains in his possession. He is bound so to insure—

1. Where the principal has effects in his hands, and directs their application to such insurance.

2. Where there are no effects in the hands of the agent, but the course of dealing between them has been such that the one has been accustomed to send orders to insure, and the other to execute them. He is bound to continue to obey such orders, until he gives notice to discontinue that course of dealing.

3. Where bills of lading come to the agent with an order to insure, this being the implied condition of their acceptance. Under such circumstances the acceptance of the bills of lading subjects the agent to the performance of the condition.

4. Where the general usage of trade requires the agent to insure.

§ 108. In case it becomes the duty of the agent to insure, and he omits to do so, he is himself considered the insurer, and liable, in the event of loss; and so fully is this principle carried out, that the agent is even entitled to be credited with the premium, which should have been paid. If he makes all reasonable efforts, and fails in accomplishing the insurance, he should immediately inform his principal, so as to enable him to effect insurance elsewhere, or upon other terms. The agent in such case can avoid liability, by showing that by his instructions he was bound to communicate a certain fact to the insurers, and that if he had communicated it, no insurance could have been obtained, and that if he had not, any insurance he might have effected would have been void. And generally he is entitled

to every species of defence which the insurers themselves might have interposed.

§ 109. In contracts made by agents, as such, two classes of questions arise; the first between the principal and agent; whether the duty of the latter has been faithfully performed; the last between the principal and third persons, whether the former is or is not bound by the contract. An illustration of the first occurs where the agent is instructed to sell not below a definite sum, in which case he will not be justified in selling under it, unless the mode of sale directed would make a secret limitation of the price a fraud upon the purchasers. Any deviation from his orders to purchase, whether relating to the price, quality, or kind, gives to the principal an option to receive the goods purchased or not. So strictly is an agent held bound to obey his instructions that in a case where he was directed to employ the money in his hands in the purchase of a bill for his principal, and he purchased it on his own credit and it proved not collectable, the principal, *by reason of the disobedience*, recovered against the agent. *Hays v. Stone*, 7 *Hill*, 128.

§ 110. Where goods have been purchased by the agent at a greater sum than the principal directed, and the latter, for that reason, elects to reject the contract; yet, if he has advanced money upon them, he need not return them to the agent, but may make the best disposition of them he is able, accounting to his agent for the proceeds over and above his advances. In the case settling this principle, *Cornwall v. Wilson*, 1 *Vesey Sr.* 509, Lord Hardwick suggests a curious balancing of equities that may arise in a case of specific instructions, and justify a deviation by the agent; as where the price of goods to be purchased is limited, but not the freight to be paid, and the price is falling in the market, while the freight is rising, and the agent purchases at a higher price than he is directed, and by shipping immediately saves more in the freight than the excess of the price paid. This he suggests would justify the agent.

§ 111. It is a rule of very rigid application, both to sales and purchases, that an agent employed to sell cannot make himself the purchaser, or to purchase, the seller. Nor can he even be permitted to purchase an interest in property, and hold it for his own benefit when he has any duty to perform in reference to such property inconsistent with his exclusive ownership of it. *Van Epps v. Van Epps*, 9 Paige, 237.

§ 112. An agent is not ordinarily compellable to account for the price of goods sold, until it has been received by him. There are two exceptions to this rule—where goods have been improperly sold upon credit, and where the delay of payment has been occasioned by his own neglect. A question has been raised, whether an agent who acts under a *del credere* commission—(that is one, who for a higher compensation guarantees all sales made by him of his principal's property)—is not directly liable in the first instance, without any reference to the original debtor; but the law, as now understood, regards him merely in the light of a surety, and hence holds him liable only on the default of the purchaser. He may, however, by drawing a bill on the purchaser in favor of his principal, render himself directly liable.

§ 113. An agent who has collected money for his principal, and deposits it to his own credit with his general banker, takes himself the responsibility of the solvency of the banker. But if he exercise reasonable prudence in the choice of a depository, and there places the funds to the credit of his principal, apprising him that he may draw for the same, he assumes no such liability, for that is one of the modes by which they may be transmitted.

§ 114. An agent is bound to keep a correct account of all his transactions as such; and from time to time, and whenever called upon to do so, communicate its results to his principal. A failure in the performance of this duty will subject him to a call from the Court of Chancery, and ultimately to a decree compelling an account—and this may



be done after a lapse of many years. In such rendition of account he must include all the increase which the property confided to him has realized. If he have made interest, he is liable for it, and so he is, whether made or not, if he mixes the money with his own funds, using the whole in his own business.

§ 115. Agents, who are acting under a joint commission, are liable for each other's receipts, and a joint consignment renders each liable to account for the whole. It is no reason for discharging one from liability that the business was wholly transacted by the other, and that with the knowledge of the principal. A discharge of one, at common law, is a discharge of all.

§ 116. Although an agent can always avoid any personal liability by contracting only in the name of his principal, and within his authority; yet there are four possible cases, in which he may assume a personal liability—

1. Where the principal is not known.
2. Where there is no responsible principal, except in the case of public agents.
3. Where the undertaking is expressly his own.
4. Where he exceeds his authority.

An illustration of the second case is where the committee of a club were sought to be made responsible in an agreement entered into by them, on account of the club, and it was held that they were liable without making the rest of the subscribers parties. *Cullen v. The Duke of Queensberry*, 1 *Brown's P. C.* 393.

§ 117. An agent who binds himself by a formal engagement always incurs a personal liability; and even a mere description of the person, or designation of the character in which a party assumes to contract, on behalf of another, does not necessarily exonerate him. He must not only *describe himself as agent*, but the language of the instrument must not *import any personal contract on his part*. So if he exceeds his authority so far that the principal is not

legally bound as a contracting party, he becomes himself liable to the person with whom he deals.

§ 118. The masters of ships, although well known as the agents of the owners, are nevertheless liable on contracts they make for repairs, unless they take special care to avoid it by the express terms of the contract. And so where money has been paid to an agent for the use of the principal, under such circumstances that it might be recovered back from the latter had it been paid to him, the agent himself will remain personally liable to the party paying it so long as it remains in his possession, and his situation with the principal is unaltered. A payment over, or a fresh credit upon the faith of it, will so change the relations as to take away the liability.

§ 119. An agent is never liable to third persons for mere non-performances of duty, but only to his principal with whom is his undertaking. But for tortious, or wrongful acts, whether done by the authority of his principal or not, he is liable to third persons. This liability is not as an agent, but as a wrong-doer; as he is only bound to obey the lawful commands of his principal. Although his refusal to deliver goods to the true owner, may, if unqualified, render him liable as for a conversion, yet it will not have that effect if qualified by a declaration that he cannot deliver them without the authority of his principal.

§ 120. The main right of the agent, in subserviency to which most of his other rights exist, is to receive a compensation, by way of commission, or otherwise, for his services. This right to his commission on sales gives him an insurable interest in the goods of his principal. Its amount is generally determinable, either by a special agreement, or the usage of trade, or by a statutory enactment. Even in the absence of all these it may be left to the jury to give the agent a reasonable remuneration. *Brown v. Nairne*, 9 *Carr & Paine*, 204. And in some cases, where there is a special agreement, he may be entitled to additional compensation

for additional services. *United States v. Fillebrown*, 7 *Peters*, 28.

§ 121. An agent employed in the carrying out of an illegal contract can recover against his principal no compensation, where the illegality must necessarily appear in the making out of his case for a recovery. But the agent cannot protect himself against the payment of money under the plea that it was received in an illegal transaction, as the only and necessary inquiries there would be—

1. Did the agent receive the money? and
2. On whose account did he so receive it?

§ 122. An agent may also so conduct himself as to forfeit all right to his commission. One mode of doing this, would be the neglecting to keep accounts, so that no foundation was laid for ascertaining the amount due. Another mode is the rendering the service so negligently, and unskilfully, that no benefit accrues to the principal. Another by departing from his character as agent and acting adversely to his principal in any part of the transaction.

§ 123. A question of some doubt and difficulty has occurred under the usury laws of some of the States, as to the right of the agent to receive commissions over and above the legal rate of interest. But it is now very well understood that the receiving compensation by such commission for accepting and paying bills with funds furnished by the principal is not usurious; nor is it necessarily so if the agent himself advances the funds for that purpose.

§ 124. An agent has also the right over and above or beyond all commissions he may be entitled to, to be reimbursed all advances made by him for his principal in the regular course of his employment, and also all damages and costs to which he may have been subjected in the due performance of his agency. A question attended with much difficulty relates to the advances an agent may be justified in making under peculiar circumstances in which he may happen to be placed. A cargo is sent so late in the

season as to hazard its safety. He may, without orders, insure. The conduct to be pursued must be very cautious in order to avoid those advances that are voluntary and officious, and therefore give him no right of recovery back. In order that an agent may be safe in the making of advances, it is necessary that they should be either—

1. Covered by his instructions express or implied ; or
2. Justified by the former course of dealing between them ; or
3. By a well-recognized usage ; or
4. Be sanctioned by the subsequent acquiescence of the principal.

§ 125. The right of *Lien*, which an agent possesses, and may enforce against his principal in reference to property in his possession, will be considered under Remedies. His rights as against third persons are grounded on the interest he has in the property growing out of his commissions, and also upon his duties in safely and securely keeping it. An auctioneer, for instance, is held to have such a special property in the goods as to enable him, at common law, to maintain an action in his own name for the price.

*Williams v. Millington*, 1 *H. Black.* 81. So the mere possession by a factor of the goods of his principal, entitles him to bring actions for injuries affecting the possession.

#### QUESTIONS.

What is the duty of the agent, relating to instructions? When do they preclude any discretion? How, when there are two or more modes of doing a thing? What are the rights of consignor and factor respectively as to controlling sale, and how may such right be transferred from one to the other? What is the liability in case of money sent to purchase a particular article misapplied? What is an agent bound to use? What is his duty where there are no specific instructions? What must he bring to his undertaking? What is he presumptively possessed of? What instance? What is his liability beyond direct injury to the property of his principal? What is the measure of damages? When is an agent not liable for neglecting an act expressly directed? In what

cases is an agent not chargeable with a breach of instructions? What instance? What is the rule in equity as to agent's making himself an adverse party? What does equity often do? To what has this no application? What is an agent in possession responsible for? What position does he occupy? What amount of care must he bestow? When, and under what circumstances, is an agent bound to insure the property of his principal? What is the consequence, if he does not? What is he to do if he makes efforts and fails? How can he avoid liability? What two classes of questions arise in contracts with agents? What illustration of one? What does a deviation authorize? What illustration? If a principal having advanced money elects to reject a contract made by his agent, what may he do? What instance of balancing of equities? What is the rule as to agent's selling and buying? What further application? When must agent account for price? When, before he himself receives it? How is agent under *del credere* commission liable, and how regarded? How can an agent become liable by depositing, and when not? What is the duty of agents, as to accounts? What one in the event of failure? What is to be accounted for besides property? When is he liable for interest? What is the liability of joint agents? When, and under what circumstances, does an agent assume personal liability? What illustration? How does he always incur personal liability? How, in case he describes himself as agent? What is the liability of masters of vessels, and for what? When to repay money, and under what circumstances? For what is an agent liable to the principal only, not to third persons? To whom for tortious or wrongful acts? How may he escape conversion of property of another? What is the main right of the agent? What does this right give him? How may amount of commissions be determined? When can an agent recover no compensation? What inquiries only are necessary, when he is required to pay over money? What are the modes by which an agent forfeits his right to any commissions? How is receiving commissions beyond legal rate of interest affected by usury laws? What right is there beyond commissions? When, and under what circumstances is an agent justified in making advances? What are his rights against third persons grounded on?

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PART V.

LIABILITIES AND RIGHTS OF THE PRINCIPAL.

§ 126. The principal is held liable for the negligence or unskilfulness of the agent, while acting in the prosecution of his agency, although not under his immediate direction.

The essential thing here is the acting in the course of his employment. If an agent, while on the business of his principal, drive his team off from the direct road, and by his careless driving injure another, the principal will be liable. But if without leave, and on his own business he drive the team about and inflict an injury, he alone will be liable.

§ 127. It was formerly held as in the case of *Bush v. Steinman*, 1 *Bos. & Pul.* 404, that the principal was liable for all acts of sub-agents, or under employees, deriving their employment however remotely from his immediate agent. But this doctrine is now overruled, and that of the limitation of liability to the immediate employee only established in its place. *Blake v. Ferris*, 1 *Seld.* 48.

§ 128. The principal is not liable for the wilful act of his agent, which occasions damages to another. An agent wilfully drives his principal's carriage against another, without his direction or assent. The principal is not liable.

§ 129. The principal will be clearly liable wherever he has expressly commanded a wrong to be done, or given orders which could be executed only by its commission; but a difficulty has occurred in clearly establishing the line of liability where the agent perpetrates a fraud without his authority but within the scope of his employment. The general principle here is that in ordinary cases of private individuals, the principal is liable to third persons for the frauds, torts, misfeasances, negligences, and defaults of the agent, even though the conduct of the agent was without his participation, consent or knowledge, provided the breach or want of duty arose in the course of his employment, and was not a wilful departure from it. There is perhaps a seeming departure from this principle in the late case of *The Mechanics Bank v. The New York & New Haven Railroad Company*, 3 *Kern.* 599. But a distinction was taken here between acts within the apparent powers of the agent, and acts apparently, but not really, within his powers. For the

former the principal is to be held liable, as he is responsible for the appearance of his agent's powers; but not for the latter, as the agent alone, if any one, is responsible for the appearance of his acts.

§ 130. Another case of difficulty has occurred somewhat the reverse of that last stated. A, through his agent, leases a house to B, which had a nuisance adjoining it, of which A was fully apprised, but did not communicate the fact to his agent, who was ignorant of it, and stated that there were no objections to the house. *Cornfoot v. Towks*, 6 *Meeson & Welsby*, 358. The court held the contract to be valid, Lord Abinger strongly dissenting on the ground that the knowledge of the principal was the knowledge of the agent. The doctrine of this case has been distinctly overruled, Lord Abinger sustained, and the contrary established in *Fitzsimmons v. Joslin*, 21 *Vermont*, 129, which asserts and maintains the doctrine that the principal would be implicated to the fullest extent for that which he knew, if he took the benefit of the agent's act. In New York, in *Dexter v. Adams*, 2 *Denio*, 646, it is carried still further, and establishes the doctrine that if the principal did *not know*, and a party voluntarily assumes the agency and commits a wrongful, fraudulent act, and the principal afterwards *seeks to take advantage of it*, he thereby *adopts and affirms the act*, and thus *defeats his own action*.

§ 131. Another principle in limitation of liability has been recently established, and that is that the principal's liability for the negligence of his agents is confined to strangers, and does not extend so far as to render him responsible to one agent for an injury arising from the carelessness of another, who is engaged in the same general business. This question has the most frequently arisen in actions brought by employees against railroad corporations, as in *Russell v. Hudson River Railroad Co.*, 17 *New York*, 134, and *Sherman v. Syracuse & Rochester Railroad Co.*, 17 *New York*, 153.

§ 132. The principal has never been held criminally responsible for the acts of his agent, with the exception of libel, in which he has been held so liable on the ground that he derived profits from the publication, furnished the necessary means to carry it on, and intrusted the conduct of it to one of his own selection.

§ 133. Any unlawful meddling with or conversion of property by an agent, while in the service of the principal, subjects the latter to an action. He is liable if he previously command or subsequently assent to it. But the wrongful acts, to render him liable, must be done under his express direction, or in his service. The employment must afford the means of committing the injury. But he can be made liable for no wilful trespass. *Foster v. The President, &c., of the Essex County Bank*, 17 Mass. 479.

· § 134. The principal will be held liable, not only for the acts, but also for the representations, declarations, and admissions of his agent, in and about the subject-matter of his agency. These, however, to be effectual in charging him, must accompany the act, explaining or qualifying it, and if made subsequently by way of giving a history of it, are not admissible. They can only be admitted as constituting a part of the act itself, and then only when the act, which they tend to qualify, is clearly within the sphere of his agency.

§ 135. Another mode by which the principal may be subjected to liability through an agent is by means of a notice to the latter. The general rule is that notice to the agent is notice to the principal; but in order to bind the latter, it must relate to a matter within the scope of his agency, and to the very business in which he is engaged, or is represented as being engaged, by authority of his principal. It must be while he is acting for the principal, in the course of the very transaction, which becomes the subject of the suit. Notice to the cashier, or other agent of the bank, is notice to the bank, if given officially. Even the



adoption, by the principal, of the act of an assumed agent, will charge him with the notice of such facts as were within the knowledge of the agent at the time of doing the act. As to the sufficiency of the notice, the rule is—"that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of every thing to which such inquiry might have led. That, when a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

§ 136. There are several ways in which the principal's liability is affected in purchases made by his agent: as

1. Where it is made by the agent expressly in the principal's name. Then he alone is liable.

2. The vendor, knowing the principal, may choose to trust the agent in preference, and having thus elected, cannot afterwards charge the principal.

3. The agent may buy for an undisclosed principal—and then, when discovered, the vendor may charge either principal or agent.

4. The vendor, after such discovery, may lay by until after settlement between principal and agent, and then he can look only to the agent.

5. The vendor may know that the other party is acting as agent, *but not for whom*; he may, upon discovery, charge the principal. *Thompson v. Davenport*, 9 *Barn. & Cress.* 78.

6. Payment by the agent discharges the principal. But if the vendor voluntarily give an enlarged credit to the debtor's agent, or adopt a different mode of payment, placing the principal in a worse situation, he is discharged.

§ 137. If an agent be permitted to deal as if he were the principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him as if he were in fact the principal. He may set off against the demand of the principal, a debt due from the agent to himself. A purchaser is discharged by payment to the agent, unless notice has been given by the prin-

principal not to pay him. And even in that case, he is protected in making payment in two cases :

1. Where the agent is acting under a *del-credere* commission.

2. Where he has a lien upon the price for his balance of account.

§ 138. As questions regarding the right to set off are frequently arising, it may be further stated that if the purchaser, while negotiating a sale with the agent, and at any time before the completion of the contract by actual delivery, come to a discovery of the principal, he cannot avail himself of a set off against the agent. But his mere general knowledge of a vendor being an agent, will not deprive him of the privilege of set off. He must have express knowledge that he acts as agent in that particular instance, as an agent who sells for others may also sell on his own account. *Berring v. Corrie*, 2 Barn. & Ald. 137.

§ 139. Where agents are properly authorized, their acts enure to the benefit of the party in whose name they are done; as a demand, by a known agent, or one who produces his authority, and is empowered to receive the thing demanded, is sufficient to maintain an action of trover. But where a demand is made by such a person, the other party has a right to be satisfied before he acts upon the demand, and hence a refusal upon that specific ground is justifiable. But a refusal to deliver on the ground of ignorance of title in the party claiming, is no protection.

§ 140. The delivery of goods to an agent, for some purposes, vests the property in the principal. As where goods purchased are delivered to the general agent of the principal, or to the one who purchases for him, the right of *stoppage in transitu* in the vendor is gone, but not if they be delivered to an agent merely for the purpose of conveyance.

§ 141. Money paid by an agent, may be recovered back by the principal under the following circumstances :

1. Where the consideration fails.
2. Where the payment is through mistake.

3. Where illegally extorted in the course of his employment.

4. Where fraudulently applied by the agent to an illegal and prohibited purpose.

### QUESTIONS.

What may the principal be held liable for? What is the essential thing? What illustration? What is the limitation of liability as to sub-agents or employees? What is the liability where a wrong is expressly commanded? What, where the act is done without authority, but within the scope of his employment? What seeming departure, and how explained? What is the rule where there is knowledge, but uncommunicated by the principal? What the rule, where injury is done to one agent through the carelessness of another? What the rule and exception as to criminal liability? What the rule in conversion of property by agent? How are acts to be done, to render him liable? What is the liability for wilful trespass? How and when is the principal liable for representations, declarations, and admissions of the agent? How, and when, and under what circumstances, is the principal chargeable with notice to the agent? In what different ways may a principal's liability be affected in purchases made by his agent? What is the consequence, where an agent is permitted to deal as if he were principal? How, as to set off? When is the purchaser not discharged by payment to the agent? When not protected in such case? When the principal is discovered before delivery to the agent, what effect has it on a set off? What effect has mere knowledge of the other party being agent? To whose benefits do agents' acts enure? What instance? Of what may the other party be satisfied, when a demand is made? For what purpose does delivery to the agent vest the property in the principal? When, and under what circumstances, can money, paid by an agent, be recovered back by the principal?

### PART VI.

#### DISSOLUTION OF AGENCY.

§ 142. There are various modes of terminating agency, as—

1. By its own limitation, which may be either express or implied. It is express when the power extends to a particular period of time. On its arrival the power termi-

nates. There is an implied termination when the business is completed, which the agent was constituted to perform.

2. By such a change in the condition of the principal as will render its continuance impossible ; such as—

(1.) The becoming bankrupt ; but this does not extend to an authority to do a mere formal act, which passes no interest, and which the bankrupt himself might have been compelled to execute.

(2.) A *feme sole* becoming a married woman.

(3.) The becoming insane, but the fact of the existence of the insanity should be previously established by inquisition, before it controls the operation of the power.

3. By such change in the character of the agent, as would have the like effect ; such as—

(1.) The bankruptcy of the agent.

(2.) The insanity of the agent.

(3.) The marriage of the agent, she being a *feme sole*, when appointed.

(4.) The renunciation by the agent ; but in such case he must give notice to his principal, or he is answerable for all damages the principal may be subjected to in consequence.

4. By revocation by the principal. A naked power of attorney or other agency not coupled with an interest, is in its nature revocable at any time, and this may be done at any moment before the actual consummation of the matter by the agent. But a question may arise as to the consequences of the revocation, or the right to revoke without incurring a liability. If the authority admits of severance, or of revocation as to the part unexecuted, either as to the agent or third persons ; then the revocation will be good as to the part unexecuted, but not as to that already performed. But if not severable, and the agent will sustain damage in consequence of the part execution of the authority ; then the principal cannot revoke the part unexecuted, without fully indemnifying the agent. The revocation of the authority of the principal agent operates as a

revocation of the authority of all his sub-agents, substitutes, or employees. There may be also an incidental revocation, as where subsequent and inconsistent instructions are given to the agent. There are two cases in which this power of revocation cannot be exercised, unless the right is reserved in the contract out of which the agency arises. These are—

(1.) Where it is coupled with an interest ; that is, where the grantee has an interest in the estate, as well as in the exercise of the power.

(2.) Where the power of attorney is part of a security for money.

5. By the death of the principal. Here two questions of great interest and importance present themselves :

(1.) When does the revocation take effect : at the period of death, or when notice of it is brought home to the agent and parties dealing with him ? The common law settles it to be at the period of death. Illustration—The family of A is supplied with necessaries by B. A goes abroad, leaving his wife authority to contract with B, and dies. B continues his supply of goods until notice of the death of A arrives. Held, the wife was not liable as she was blameless, and the revocation was the act of God. Conceded also, that the executors of the husband were not liable, the death being a revocation of the agency. No one was liable on the contract. *Smout v. Jeberry*, 10 *Meeson & Welsby*, 1. A different rule is established in Pennsylvania in *Cassidy v. McKenzie*, 4 *Watts & Serg.* 282, in which the broad principle is assumed that the determination of an agency by death, like an express revocation, takes effect only from the time of notice.

(2.) What effect has the revocation by death when the power is coupled with an interest—that is, an interest in the thing itself. The following test is laid down by *Ch. J. Marshall* in *Hunt v. Rousmainier*, 8 *Wheaton*, 174. If the interest or title, originally vested in the principal, remains there after the power is executed, so that every thing must

continue to be done in his name, then it must die with the person giving it. But if such interest or title passes with the power, and vests in the person by whom the power is to be exercised, then such person acts in his own name, is no longer a substitute for another, and the death of the person executing the power does not revoke it. Another test is the connecting the power with the indemnity of the agent. Instance: The principal, going abroad, gives the agent full and entire possession and control of his property, with power to sell all or any part of the stock and property which might be in his hands, and apply the proceeds to the payment of a note endorsed by the agent and a third person. The agent has a power, coupled with an interest, which survives upon the death of the principal. *Knapp v. Alvord*, 10 *Paige*, 205.

#### QUESTIONS.

What is the first mode specified by which agency may be terminated? In what two ways? What the second mode? In how many different ways? What the third mode? In how many different ways? What is to be done in case of renunciation? And at what risk omitted? What is the fourth mode? What the consequences of revocation? How where authority admits of severance? How where not severable, and the agent will sustain damage? What effect has a revocation of the authority of the principal agent? Can there be an incidental revocation, and how? In what two cases is there no power of revocation without a reserved right? What the fifth mode of revocation? What the first question there presented? What is the rule of revocation as to time in case of death of principal? What the rule of the Common Law? What that in Pennsylvania? What is the second question presented? What is the first test laid down by Ch. J. Marshall? What the second laid down by Chancellor Walworth?

# BOOK III.

## R I G H T S .

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### FIRST DIVISION—RIGHTS RELATING TO THE PERSON.

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## CHAPTER I.

### OF CONTRACT.

THIS involves three general inquiries: 1. *How made.* 2. *How construed.* 3. *How performed.*

The *first* seeks to ascertain what a contract is,—what are its elements, and what their combination so as to make a perfect contract.

The *second*, what kind of construction shall be adopted to give it the most complete effect.

The *third*, what are the defences that will establish its complete performance.

### PART I.

#### CONTRACT AND ITS ELEMENTS.

§ 143. *A simple contract is “An agreement, upon sufficient consideration, to do, or not to do, a particular thing.”* This, on its first analysis, yields three elements: 1. The agreement; 2. The consideration; 3. The thing to be done or omitted. Of these, the first is a compound, and yields also, upon analysis, three elements, viz.: 1. The

parties to the agreement ; 2. The ability to contract ; and 3. The assent. So that we have the entire simple contract presented in five elements ; these being :

1. The parties who enter into it.
2. Their ability to make a binding agreement.
3. The mutual assent, or union of minds, of the contracting parties.

4. The consideration, or motive, upon which this assent or union reposes.

5. The thing which is agreed to be done or omitted.

§ 144. The first and second of these have already been briefly alluded to under the Sole Trader. The third relates to the *assent* or *union of minds* of the *contracting parties*, and its *mutuality*. This is essential to create a legal contract. There must be a clear, definite promise, deliberately made by the party sought to be charged ; and which has been duly accepted by the person who claims the benefit of it.

§ 145. With parties legally competent to contract, the first thing presenting itself on the part of one of them is the *proposition*. This is a mere offer or overture, which is binding upon neither so long as it remains unaccepted. It can be at any time withdrawn, as there is no acceptance to fix it, and no consideration to compel its continuance for future acceptance.

§ 146. The next thing in order is the *acceptance*. In this is found the *assent*, the *union*, the *meeting* of the minds of the contracting parties in reference to the subject-matter of the contract. It is entirely immaterial by what signs or indications, whether by words, by writing, by silence, by shaking hands, or by whatever else, such acceptance is evidenced. The fact, however established, will necessarily draw after it the legal consequence.

§ 147. Where a promise merely is made on each side, the two must be concurrent and obligatory at the same time upon each, or it will be binding upon neither. *Utica &*



*Schenectady Railroad Company v. Brinkerhoof*, 21 Wend. 139. *Lester v. Jewett*, 12 Barb. 502. This, under recent decisions, requires the following modification; viz.: If an agreement be optional as to one of the parties, and obligatory as to the other, it does not destroy its mutuality, if there be a sufficient consideration on both sides; as if one party stipulates that he will deliver salt when called on, and the other that he will pay for the salt so delivered. This is mutuality, and one promise is in consideration of the other. See in illustration *L'Amoureux v. Gould*, 3 Seld. 349.

§ 149. Where the proposition is verbal, and no stipulation as to time of acceptance, in order to bind, it should be accepted on the spot. There is nothing to enforce the continuance of the proposition.

§ 150. A question of much doubt and difficulty in its settlement is presented in what is termed the *refusal question*. One obtains from another the refusal of certain goods at a certain price until a certain future period of time, and the question is whether such a contract is binding on both parties, and whether the would-be purchaser, on tendering the price within the time, is entitled to the goods. The better opinion seems to be that he would not, if the other party had, in the mean time, withdrawn his proposition and sold the goods.

§ 151. Another question of vital importance to the merchant relates to the precise point of time at which the minds of the contracting parties meet, and the contract becomes complete where the negotiations are conducted by letter. A person in Albany offers, by letter, to sell to a person in Baltimore certain goods on certain terms. The letter reaches Baltimore on the third day. The party to whom it is directed, on the same day writes and mails a letter of acceptance. But the writer in Albany, on the day after he had written and mailed his first letter, writes and mails a second, revoking his former offer. The gentleman in Baltimore receives it the day after he has sent his letter of acceptance.

The question is: Are the goods sold? Answer. They are. The offer goes with the letter, and is a continuing offer unrevoked to the knowledge of the other party until its acceptance. A telegraphic revocation, arriving before acceptance, would have destroyed the proposition, and hence prevented the acceptance. But no such means being resorted to, the letter carries the offer to the other party, who has a right to presume its continuance, and by his acceptance transform it into a valid contract. *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 1 Kern. 441.

§ 152. The acceptance, to complete the contract, must be in the very terms of the proposition. Any variation would render it a new proposition, instead of an acceptance of a former one. A good test of the sufficiency of a contract is that it be so certain and complete that each party may have an action upon it as to those things that are for his own benefit.

§ 153. There are four exceptions to the rule requiring mutuality of assent and obligation on the part of contracting parties:

1. An offer of reward. Here the contract performance of that which entitles to the reward, gives the legal right to it without any previous acceptance or promise of performance.

2. An infant, with some qualifications, may hold the other party to the performance of his contract, while he can set up his infancy as a defence to an action brought against himself.

3. A person induced through fraud to enter into a contract, may have a remedy against the other party, while the law gives him a perfect defence to any action upon it, brought by the person who has perpetrated the fraud.

4. Those contracts required by the statute of frauds to be in writing, signed by the party to be charged, admit of a remedy against the parties signing, while they deny any against the one who has failed to do so.

§ 154. The law, however, never requires *express assent*.

It is satisfied with such as may be *implied* from the circumstances of the case. It will always raise an *implied contract*, where reason and justice unite in demanding it. One accepts, or with full knowledge of all the circumstances under which they were performed, deliberately avails himself of the benefit of services rendered him by another, without any previous authority or request. This will imply an assent to pay for them a reasonable compensation. The principle is carried further; and where a party accepts an agreement from which he is to receive a benefit, when he shall, on or before a certain day, have performed a certain act, it is held in law an implied promise to perform the act by the time stated.

§ 155. But the law will never *imply* an assent or promise where there is an *express one*, nor even against express declarations made at the time by the party sought to be charged. But it will, under some circumstances, imply an *assent* and *promise* where, in fact, none ever existed. A, for instance, takes the goods of B, and converts them to his own use. B brings an action for the price, as upon a contract of sale. A, although never intending to pay, is precluded from setting up in defence his own tort or wrong, and hence is held bound to answer for their true value.

§ 156. The well-settled *usage or custom of trade*, affects differently *express* and *implied* assent. With the first mentioned, it has nothing to do. The express stipulations of the parties are binding upon them, whatever custom or usage may exist to the contrary. But implied assent is always held to be modified by usage or custom, because it is presumptively held to be given in reference to it. But to enable such usage or custom to exercise this modifying effect, it is necessary either that both parties should have had notice of it, or that it be so general, and long continued, that both may fairly be presumed to have known it.

## QUESTIONS.

What is a simple contract? What is yielded on its first analysis? What on its second? What is essential in reference to the third element? What is the first thing presenting itself? What is this, and what can be done with it? What the next? How indicated? Where there is a promise only on each side, what is necessary to render them binding? What modification? Where the proposition is verbal, what is necessary? What is the refusal question, and how settled? What completes and renders binding the contract when the negotiation is by letter? How must the acceptance be to render it complete? What four exceptions to the rule requiring mutuality of assent? What may supply the place of *express* assent? When does the law raise an implied contract? What does the usage or custom of trade affect? What necessary in regard to such usage or custom?

## FOURTH ELEMENT—CONSIDERATION.

§ 157. The fourth element in the perfect contract is the *consideration* upon which the assent must be based, and without which it is of no legal effect. The main inquiries here are :

1. What is it? and
2. What the test of its sufficiency?

§ 158. The *consideration* is the *reason, motive, or inducement*, upon the strength of which both parties consent to be bound. It may be either, 1. Good, or 2. Valuable. The *first*, consisting in blood relationship, natural love and affection, is good only as between the parties, sustaining as to them, contracts already executed. The *second*, consisting of something of value to be paid or done, or of some inconvenience to be suffered, makes it a valid contract everywhere, and as against all parties.

§ 159. The test of its sufficiency will be found in the analysis and ascertainment of its elements. These are two in number :

1. A *benefit* to the *promissor*, or party promising.
2. A *loss* or *inconvenience* to the *promisee* or party promised. Either one of these is sufficient, and hence if the

contract discloses that the party promising derives any benefit, or the party promised sustains any loss, it cannot be pronounced defective in point of consideration. Both the benefit, and the loss or inconvenience, may be very slight, and yet be legally sufficient, as the law leaves the extent of both to the judgment of the parties. Where a debt is claimed, and a promise is made to pay it if the party claiming will make affidavit of its existence and amount, and he does so, that is held a sufficient consideration to support the promise. Even if a person becomes a party to an agreement from which he receives no benefit, yet if it be such as the other would not have entered into, unless he had become such party, it is a sufficient consideration to bind him to his promise.

§ 160. A question of great practical importance has arisen as to how far the *intrusting a person with property* is *in itself* a consideration to support a promise to perform the trust. It is well settled that a *non-feasance*, or the *not doing* of that which, without any consideration, was undertaken to be done, can give no cause of action. A party voluntarily promises to get a vessel insured, but neglects to do so, and the vessel is lost. There is no cause of action, because no consideration. But where one party is retained by another, although without consideration, and enters upon the performance of the work or undertaking, and through his negligence an injury is effected, that is a *mis-feasance*, and the party is liable. So also when one undertakes to perform the trust, and *receives the property* in relation to which it is to be performed, thus *entering upon its performance*; such receipt is regarded in the nature of a consideration, and creates a liability if it be so improperly performed as to be productive of injury to the other party. *Coggs v. Bernard*, 2 *Ld. Raymond*, 909. *Rutgers v. Lucet*, 2 *John. Cas.* 92.

§ 161. Another question has arisen regarding the sufficiency of a *promise* as a consideration to support a *promise*.

In case of mutual submission of differences to arbitration, the mutuality of the promises embraced in the submission will uphold and support the promise of each. So, also, a mere promise to do an act at a future period is a sufficient consideration to sustain an engagement on the part of the other party, or a promise on his part to do an act in the future. The principle of liability is mutuality of obligation. Unless both are bound in all such cases, neither can be. Mutual promises to marry are binding, and support each other upon this principle—the one forming the consideration for the other.

§ 162. Another matter that has been drawn in question is the sufficiency of *pre-existing moral obligation* as a consideration to support a promise. The rule here is that a mere *moral obligation* to pay a debt or perform a duty is a sufficient consideration to support an *express promise*, although there existed at the time no legal liability. A familiar instance of this occurs where a debt has once existed, but to the payment of it may be interposed the defences of the statute of limitations, infancy, or a discharge under an insolvent law. In all such cases an *express promise*, without any new consideration, restores the legal remedy.

§ 163. Another point regards the sufficiency of *forbearance* to prosecute or press the collection of a debt due, as a consideration to support a promise. The rule here is, that an agreement to forbear for a certain, definite, or reasonable time, to prosecute a well-founded legal or equitable demand, is a sufficient consideration to support a promise on the part either of the debtor, or of a third person.

§ 164. No promise can be legally enforced that is founded either upon no consideration, or even upon what is technically termed a good consideration. The following are instances in illustration: The master of a ship promises his crew an addition to their fixed wages in consideration of their making extraordinary efforts during a storm. This is a gratuitous promise, and not enforceable. A promise to

pay the debt of another, already incurred, is gratuitous and not enforceable.

§ 165. Suppose the consideration to be naturally of impossible performance, the contract into which it enters can never be enforced. No benefit could ever be conferred upon the promissor. The salutary rule of the common law is, that every person who, in consideration of some advantage to himself, promises a benefit to another, must have the power of conferring that benefit up to the extent to which it professes to go.

§ 166. The objection, however, must go to the entire impossibility of performance. And even that is insufficient, if it applies only to the promissor individually. Where a party lays a charge upon himself, he is bound to perform, or respond in damages. A promises, upon sufficient consideration, to procure the consent of his landlord B, to the assignment of a lease. B declines, and hence performance cannot possibly be had. A is still bound by his promise.

§ 167. Where one of several *professed considerations* is *frivolous* and *insufficient* of itself, not being *illegal*, the contract is not, therefore, annulled, if there is still left an adequate consideration to sustain it. But if a promise resting in parol, or being merely verbal, be *entire*, and part of it relate to a matter, required by the statute of frauds to be in writing, the whole would be void. So, also, if part of the consideration be illegal, the entire contract would fail.

§ 168. A past, or executed consideration, is insufficient to support an express promise, unless it was moved by the precedent request of the party promising. In such case, the subsequent promise is linked with the precedent request, and thus together make the consideration complete. This prior request will even be presumed where the party promising has derived a personal benefit from the precedent consideration. A pays a sum of money to a third person for B, without his knowledge or request. B subsequently

promises payment. A prior request to pay it will be presumed.

§ 169. A contract, except in certain prescribed cases, may be either in writing, or may be merely verbal, and in either case is subject to the same rules. The difference lies only in the evidence by which it is established. In the one case it is the production of the writing and the proof of signature. In the other the negotiations embodying the agreement. If put in writing, no set form of words is necessary, but great care must be taken to include in the writing all the stipulations that enter into and form a part of the contract. A contract is not susceptible of being fully proven, that exists partly in writing and partly in parol, because as the parties have chosen to make the former the evidence of it, and that being the highest evidence, neither one of them can resort to any other evidence. Hence the verbal part is excluded.

§ 170. There is an extensive class of contracts, which the statutes enacted in most of the States for the prevention of fraud and perjury require to be in writing, and signed by the party to be charged. Within this class are included all undertakings to *answer for the debt, default or miscarriage of another person*. This is held to apply only to *collateral engagements*, or to those where there already exists a debt or legal liability on the part of the third person. It has no application to the cases where there is an original promise made at the time of the creation of the debt or duty, and where the credit is given to the promissor. A requests B to sell and deliver to C certain goods, and he will see that the same are paid for. This is an original promise, not within the statute, and need not be in writing to be enforced. C, having purchased certain goods of B, and payment for the same being demanded, A requests B to give to C a further term of credit, and he will see that the goods are paid for. This is a collateral undertaking, is within the statute, and must be in writing to be legally enforced. The



necessity for a consideration exists as well in one case as in the other.

§ 171. One excellent test to determine whether the engagement is, or is not, collateral, is to ascertain to whom the credit was given, to whom the charge was made by the vendor—upon whose responsibility he parted with the goods. This the account books of the vendor will generally show. The rule is, that if the person for whose use goods are furnished *be liable at all*, then the engagement of that other, although it formed the chief inducement to supply the goods, *is collateral*, and hence within the statute.

§ 172. If, however, a promise to pay the debt of another, be founded on some new and distinct consideration, wholly independent of the debt, and one moving between the parties to the new promise, as where property of the debtor is assigned to one in consideration of such promises, it is not within the statute, but is regarded as an original undertaking. *Leonard v. Vredenburg*, 8 *John.* 29.

§ 173. Another test which is applied to determine the original or collateral character of the engagement, is to examine the effect of the new agreement, and if it be such as to *destroy or discharge* the original demand, it is not within the statute. The original vendee of goods, being unable to pay for them, transfers them to another, with the assent of the vendor, to whom that other promises payment. By this substitution, the debt of the original vendee is discharged, and the new undertaking assumes therefore an original character. But in this entire class of cases, the new and original consideration must be such as to shift the actual indebtedness to the new promissor, so that if any relations are left between him and the original debtor, the latter shall become merely a surety for the performance of the other. *Kingley v. Balcome*, 4 *Barb. S. C. Rep.* 131.

§ 174. The writing in order to comply with the statute, must state both the consideration and the promise, and be signed by the party who is sought to be charged. The in-

sertion of the words "value received," is a sufficient statement of consideration. *Watson v. McLaren*, 19 Wend. 557.

### QUESTIONS.

What are the inquiries as to consideration? What is a consideration? Of what kinds? What a good consideration? What a valuable one? What the two elements of the consideration? What as to their extent? What illustrations? What is the difference between *non-feasance* and *mis-feasance*? Does either and which create a liability? Under what circumstances may one promise be the consideration for another? What illustration? How is pre-existing moral obligation as a consideration for a promise? What will restore a legal remedy where it exists? When is forbearance a sufficient consideration? When cannot a promise be enforced? What illustration? How when performance is naturally impossible? Why cannot such promise then be enforced? How far must the objection go? How when applied to promissor individually? What illustration? What is the rule when one of several considerations, not illegal, is frivolous and insufficient? What exception? When is a past or executed consideration sufficient? And how made so? When presumed? What illustration? How may contracts be made? How proved? What difficulty where a contract is partly in writing and partly verbal? What undertaking is within the Statute of Frauds? What does this apply to? To what has it no application? What illustrations of each? What the first test mentioned? What the rule of liability? How when founded upon some new consideration independent of debt? What another test mentioned? What illustration? What, in such case, must the new consideration do? What must the writing state to comply with the statute? By whom signed? What the effect of inserting "value received"?

### FIFTH ELEMENT.—THE THING TO BE DONE OR OMITTED.

§ 175. This involves the question of legality, and hence a reference to that class of contracts termed illegal. The general rule here is, that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. But that immoral or illegal character is never presumed. It is the subject of averment and proof; and where the contract is for the performance of an act which may be effected by means that are lawful or unlawful, the law will

presume in favor of the former, and thus sustain the contract.

§ 176. Contracts are void for immorality,

1. Where the consideration embraces *future illicit cohabitation* between the parties. *Past cohabitation* has formerly been deemed a sufficient consideration, but a recent decision in England pronounces that also void. *Beaumont v. Reeve*, 8 *Ad. & El. N. S.* 483. So that the rule is now understood to be limited to those cases where a prior legal obligation or consideration had once existed. No recovery can be had for the rent of tenements knowingly let for the purpose of prostitution, or even where they are employed for such purpose with the knowledge of the lessor.

2. Where the consideration is a *bet* or *wager*. At common law, all such bets and wagers are void, as

1. Contravene public policy or morality, or tend to the detriment of the public, or

2. Affect the interest, feelings, or character of a third person.

§ 177. Another extensive class of contracts rendered void at common law are those *injuriously affecting public policy*. Such are all those that,

1. Are *in general restraint of trade*. The public has an interest both in the services of the citizen, and in guaranteeing to him the perfect liberty of carrying on the trade or business in which he has been educated, as a means of sustaining himself and family. Hence the well-settled principle of common law, that a contract by which a party stipulates, although for a consideration, either not to carry on a special trade or branch of business *anywhere*, or not to carry on *any business*, is illegal and void. But a contract in *partial restraint*, as where it is limited to specified places, or beyond a certain distance, or with particular persons, may be sustained. A difficulty arises in the application of the rule. No precise *limits of restraint* can ever be laid down. The nature of the trade or profession, the populous-

ness of the neighborhood, the mode in which the trade or profession is usually carried on, each and all, together with the consideration, are to be considered. The reasonableness of the limitation is a question of law, and must be shown affirmatively, as the legal presumption is, that all such restraints are void. *Chappel v. Brockway*, 21 Wend. 157.

2. *Contracts contravening the policy of insolvent acts.* A contracts with B to pay him such a sum of money, in consideration that he will withdraw all opposition to his discharge under the insolvent law. This is a void contract. So also is an agreement in which the consideration is the omission of the debt of a creditor from the insolvent's schedule.

3. *Contracts in restraint of marriage.* The rule is, that a contract, the object or effect of which is to restrain or prevent a party from marrying *any person*, is illegal and void. So a *marriage brokerage contract*, by which one, for a consideration, undertakes to procure a marriage between two parties, is void. Even deeds of separation between husband and wife, are void under some circumstances, as contravening the policy of marriage. *Rogers v. Rogers*, 4 Paige, 516.

4. *Contracts preventing or impeding the course of public justice.* Illustrations: Agreements which have for their consideration the suppression of evidence, the stifling or compounding a criminal prosecution, or proceedings for a felony or a misdemeanor of a public nature, are void at common law. A corporation agrees to grant certain privileges to individuals in consideration that they withdraw their opposition to the passage of a legislative act, affecting the interests of the corporation; the contract is void. *Pingry v. Washburn*, 1 Aik. 264 (a). So also an attempt to contravene the policy of a public statute, or that of an act of Congress. A agrees to give B \$1,000, in consideration that he will not offer himself to the Postmaster General to carry the mail route. Held void. A contract to use *per-*

*sonal influence* to procure the passage of a legislative act is void. *Rose & Hawley v. Truax*, 21 Barb. 361.

§ 178. *Fraud* is another disturbing element that may render void all contracts into which it enters. This may be defined: the wilful adoption and use of any means or expedients with the intent to deceive another to his injury. The general rule is: that it avoids all contracts, both at law and in equity, whether the object be to deceive the public, or third persons, or the parties to them. This avoidance is, from the beginning, producing the same effect as if they never existed.

§ 179. This disturbing element extends to representations made by an agent. An agency may even be presumed, for this purpose, as where a party has made a false representation to one person as an inducement to a contract, and he knows that that person has stated such representation to a third person, who, upon the faith of it, makes a contract with the first party. Here the intermediate person may be considered an agent of the first party by implication. In our jurisprudence the principle has been carried still further, and it has been held sufficient that where a fraudulent act is done by a third person for the benefit of a party who is at the time entirely ignorant of the act, yet if he subsequently seeks to take advantage of it, he thereby affirms it, becomes, in some sense, a party to it, and thus deprives himself of all benefit under it. *Dexter v. Adams*, 2 Denio, 646.

§ 180. The contract into which fraud enters is only voidable at the election of the party against whom it is practised. The party defrauding can never take advantage of his own wrong. And the party defrauded, if he elect to rescind, must exercise the right within a reasonable time after the discovery of the fraud. If, after knowledge that fraud has been practised, he deals with the subject-matter of the contract as his own, he cannot afterwards avoid it, even although he may subsequently discover further circumstances connected with the same fraud. Where the

party defrauded rescinds an express contract, he cannot set up an implied one, and seek a remedy upon that. Where both parties have been guilty of a fraudulent intent, the law refuses to interfere, leaving both as it found them.

§ 181. Although the rule has been somewhat fluctuating, yet it is now understood that a material misrepresentation, although not embodied in the contract, is considered a constructive or legal fraud, although made without any wilful intention to deceive, but merely through carelessness, mistake, or ignorance. *Smith v. Richards*, 13 *Peters*, U. S. R. 26.

§ 182. The question has been much discussed, how far a person entirely disinterested may render himself liable, for making a false and fraudulent representation to another, upon the strength of which that other, in acting, sustains damage. A represents B as entirely solvent, and worthy of credit; C, acting upon this representation, trusts B with goods upon credit. B turns out to have been, at the time, insolvent to the knowledge of A, and the debt is worthless. The question is whether C can recover the debt thus lost of A. Upon proving clearly the above facts, and bringing home to A, at the time, the knowledge of B's insolvency, C is entitled to recover of A the value of the goods sold. *Allen v. Adington*, 7 *Wend.* 9; also same case, 11 *Wend.* 374.

§ 183. It is a rule that the suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist upon being informed, is fraudulent, and will invalidate a contract. This is confined to *facts*, not embracing *opinions* or *conclusions*. A distinction is here taken between *extrinsic* circumstances,—such, for instance, as affect value, as the state of the market—and *intrinsic*, relating to the nature of the article, its character and condition. In respect to the former, the rule is that neither party is bound to state them to the other, and mere concealment

will not annul the contract. But the party practising concealment must neither say nor do any thing indicating assent to any proposition involving any mistake by the other party. The part he performs must be entirely negative.

§ 184. In relation to the *intrinsic*, the rule is: that mere silence, as to any thing which the other might, by proper diligence, have discovered, and which is open to his examination, is not fraudulent, unless a special trust and confidence either exist between the parties, or may be implied from the circumstances of the case. But any concealment of latent defects, more especially within his own knowledge, and which could not have been readily discovered by the other, would avoid the contract. And whenever silence would be equivalent to a misrepresentation, or assent to a false statement, no party would be permitted to be silent; and if one party should state certain facts in relation to the subject-matter of a contract, in presence of the other, and that other should be silent when he ought to answer, his silence would amount to assent, and he would be bound the same as if he had made the statement.

§ 185. The commission of *fraud upon third persons* occurs the most frequently in two cases.

*First*,—in contracts between insolvent debtors, and certain of their creditors. In a general compromise of debts, as the creditors all bargain for an equality of benefit, as to payment or security, any private agreement between the debtor and any creditor who joins in the general arrangement, that he shall receive more money or better security than the others, is a fraud on them, and therefore void.

§ 186. The *second* is found in the practice frequently resorted to, of employing *by-bidders* or *puffers* at auction sales, in order to take advantage of the eagerness of bidders, and extort high prices. Two things are necessary, to lay a foundation for this species of fraud:

1. A secret understanding with the auctioneer, that they shall not be held to their bids, and

2. The object must be to excite competition, to inflate the price by running up the property to a higher price than it would otherwise attain. The rule is: that if all the bidders except the purchaser were fictitious, or, if the bid immediately preceding his was a fictitious one; in either case, the buyer may avoid the purchase. But in case a *puffer* be employed, and there is a competition among real bidders after he has ceased bidding, the sale cannot be deemed fraudulent. It is also entirely competent for the vendor, previous to the commencement of the sale, to give public notice that he will employ puffers and by-bidders, or he may order the goods to be set up at his own price, and not lower; or he may previously declare as a condition of the sale, that he reserves a bid for himself.

§ 187. A mutual agreement between two, not to bid against each other at a public auction, and that one shall buy articles and divide them with the other, is void as against public policy. So at a public sale of property levied on by execution, the forbearing to bid is an unlawful consideration for a promise.

§ 188. Contracts are also rendered void by statute as well as by common law. All contracts in violation of a statute, either as to the consideration, or the thing to be done or omitted, are utterly void. Although a party cannot set up his own fraud in avoidance of his contract, yet he can his own criminality, provided it consists in violating some positive statute of the government.

§ 189. A distinction formerly prevailed between instruments void *in part by statute*, and in part *at common law*: but the rule may now be stated to be—that if any part of the *entire consideration* for a promise, or any part of an *entire promise*, not in its nature capable of separation, be illegal either at common law, or by statute, the *whole agreement* is void. Where there are two considerations to a



promise, if either of them be unlawful, the promise is void ; but if one of them only be void, the other will support a promise. And so, also, where the contract is to do two or more acts for a legal consideration, and one of them is void, and capable of being separated from the others, the contract is binding in respect to the lawful acts, and void as to the remainder.

§ 190. It is not necessary that a statute should directly *prohibit* in order to render void a contract. It is sufficient if it *inflicts a penalty* upon the performance of what the contract stipulates to be done. The only question is, does the statute prohibit the contract ? The particular form or manner of prohibition is not material.

§ 191. The statute bearing upon contracts, which all classes of men are the most interested in understanding, is that of USURY. This means the illegal rent of money, and is embodied in a contract by which, on a loan of money, a greater amount of interest is reserved for its use than is allowed by the law of the State that controls the contract. The two inquiries that arise are, What constitutes usury ? or when can a contract be pronounced usurious ? and What are its consequences when once established ? As usury laws prevail in most of the States, the first inquiry may arise, and be the same in almost or quite every State in the Union, while the second will present an almost infinite diversity.

§ 192. It is essential to the very being of usury that there should be a *loan*, although it need not be such in terms, provided it be something that amounts to it. This is sometimes concealed under the cover of a fictitious sale ; as where on A's being applied to, to loan a sum of money at fifteen per cent. on a mortgage of land, declined doing so, but proposed to *purchase* the land for the *sum mentioned*, and to *rent it* to the *borrower* or vendor for a rent equivalent to *fifteen per cent.* on the sum advanced, with a privilege to redeem the property for the *sum advanced*, on paying up *the rent*, which proposition was accepted. This was held a

usurious contract. *Tyson v. Rickard*, 3 *Harris & Johnson*, 109.

§ 193. Another device is to advance money and goods together, or goods alone, at a certain sum specified, and by a certain time a sum equal to the price at which the goods are valued, is to be returned together with the money. This, if manifestly intended as a loan, is usurious.

§ 194. To make out usury it must be shown that the loan was for *more than the legal rate of interest*. This need not be in terms, as a device may be resorted to for the purpose of securing such illegal rate, as where a sum of money is loaned at the legal rate of interest, but the lender at the same time compels the borrower to take of him a house at a rent far above its real value. It is, however, necessary to prove *an agreement* to take usurious interest, for if reserved by mistake it is not usury. But neither a mistake nor ignorance of the law will excuse a contract clearly usurious.

§ 195. The reserving or the taking of compound interest is not usurious, but unless a prior agreement be made, no compound interest is recoverable.

§ 196. There may be a charge for bona fide expenses incurred in and about effecting a loan of money beyond the legal rate of interest which will not be usurious. *Baynes v. Fry*, 15 *Vesey*, 120. But a loan must not be mixed up with the transaction, nor the compensation demanded be unreasonable. *Steel v. Whipple*, 21 *Wend.* 103.

§ 197. It is not usurious for individuals or for banks to take the interest in advance upon loans, if it be done bona fide, and in the ordinary course of business. Although the peculiar circumstances of the case may render it usurious. *Marvine v. Hyman*, 2 *Kern.* 223.

§ 198. Another feature that must be present and enter into all questions of usury, is that the *principal must be at all events to be re-paid*. If the lender assume a risk upon the loan, and, by the terms of the contract, the re-payment

of the sum is hazarded, the contract is not usurious. For instance, money is lent on a bottomry bond, the re-payment being dependent on the safe arrival of the vessel. An interest otherwise usurious does not avoid it. Post-obit bonds, where a smaller sum is borrowed and a much larger agreed to be re-paid when the obligor by the death of his father comes into the possession of his property, is another instance. A more common instance is where the lender becomes a *partner* with the borrower, assuming the partnership responsibility to the creditors of the firm. There a contract for the loan and partnership is good, although it be stipulated that interest beyond the legal percentage on the sum advanced and to be brought into the business, shall be paid to him.

§ 199. Another noticeable feature is, that although more than the legal rate of interest be reserved upon a contract for the loan of money, yet if it be a part of the agreement that the borrower may discharge himself from the payment of *any* interest at all, by the re-payment of the principal on a certain day, the case does not fall within the statute. *Wells v. Girling*, 4 *Moore*, 78.

§ 200. To render a contract usurious, the *interest must be reserved at the time of the agreement*. No subsequent reservation, or arrangement for a usurious security, will invalidate the original claim.

§ 201. One of the consequences of entering into a contract clearly usurious is, that any remote security for any part of the illegal interest, or to enforce the usurious contract, is made to follow the destiny of the contract, and is unavailable for any purpose. Thus a mortgage taken on a loan of money, including a former usurious loan, is void. *Jackson v. Packard*, 6 *Wend.* 415.

§ 202. Suppose a legal indebtedness already existing, and in consideration of forbearance, the debtor agrees to pay usurious interest upon it. The second, or usurious contract is void, but the original debt having no taint of usury

in its creation, is valid and enforceable. The effect of such a contract in discharging the sureties upon the original debt, came up for consideration in *Vilas v. Jones*, 1 *Comst.* 274; and it was held that the contract to forbear being void, the sureties were not discharged.

§ 203. It is of no consequence whether the usury be reserved in one instrument or in several; or whether there be a note for the payment of the sum borrowed with legal interest, and a separate verbal agreement to pay usurious interest. The only question to determine is, whether by the terms of the agreement itself, without any respect to the manner by which it is evidenced, a greater than the legal interest is reserved, and this is a question of fact to be determined by a jury.

§ 204. It is only the borrower who can set up usury, he being the only party aggrieved. The lender will not be permitted to disturb a contract which is executed. And where the mortgagee of real estate which was subject to the lien of a prior judgment, confessed by the mortgagor upon a usurious consideration, moved to set the lien aside, his application was denied, he not being a borrower within the meaning of the statute. *Rexford v. Widger*, 2 *Comst.* 131.

§ 205. Where a note or other security is given originally upon a legal consideration, it cannot afterwards become usurious, at whatever rate it may be purchased or discounted. It may, like any other chattel, be bought and sold at its market value; and at whatever sum purchased, the maker of it will be compellable to pay the full amount due on its face. But an accommodation note, or one given without value, but to enable the holder to raise money upon, becomes a usurious security in the hands of any person who discounts it at any greater than the legal rate of interest. The reason is, that it first creates a debt and becomes available paper in such hands, and is, therefore, usurious in its inception.

§ 206. The simple exchange of notes, by which the credit of one party is given in exchange for that of the other, could not be said to attach the quality of accommodation to either; but if, by the obligations exchanged, the amount ultimately to be paid by the borrower is greater than that to be paid by the lender, the transaction would be considered as usurious. *Schermerhorn v. Tallman*, 4 Kern. 93.

### QUESTIONS.

What is the general rule respecting illegal contracts? What the presumption? How where the contract may be effected by means lawful or unlawful? What contracts are void for immorality? When are *bets* and *wagers* void at common law? What contract is void as injuriously affecting public policy? When is a contract in general restraint of trade? When in partial restraint? What is considered in deciding on the reasonableness of the restraint? What contract contravenes the policy of the insolvent acts? What is the rule as to contracts in restraint of marriage? What is a marriage brokerage contract, and how considered? What instances of contracts preventing or impeding the course of public justice? What is the effect of fraud? How defined? What the general rule? When avoided from? How when committed by agent? In what case may agency be presumed, to punish a fraud? How much further has the principle been carried? At whose election is a fraudulent contract avoided? When must he exercise the right? How if with knowledge he deals with the subject-matter? When an express contract rescinded, what effect has it on an implied one? How where both parties are guilty of fraudulent intent? How where material misrepresentation made without wilful intent? How may a disinterested person render himself liable for false and fraudulent representations? What instance in illustration? What is the rule as to suppression of material facts? What the limitation? What the distinction between *extrinsic* and *intrinsic*? What the rule as to the *extrinsic*? What as to the *intrinsic*? When cannot a party be permitted to be silent? When does the commission of a fraud upon third persons occur? What necessary to make employment of puffers or by-bidders, a fraud? What the rule? What the validity of an agreement not to bid against each other at auction? When are contracts void by statute? Can a party set up his own criminality in defence? What is the rule as to contracts made void by common law or statute? In what other way can a statute render void except by prohibiting? What is usury, and how embodied in a contract? What two inquiries in relation to it? What is essential to

the being of usury? What instance of a loan under pretence of a sale? What other device resorted to? What must loan be for, to be usurious? What instance of device here? What must be shown as to the taking of interest? How is the taking of compound interest regarded? May there be charge for expenses beyond the legal rate, without being usurious? How is it when interest is taken in advance upon loans? What necessary as to principal to make contract usurious? What if lender assume risk upon loan? What instances in illustration? What if borrower can discharge himself by re-payment of principal without any interest? When must interest be reserved to be usurious? How is it with remote security taken on usurious debt? Where legal indebtedness exists, how is it with usurious contract for forbearance? In what different ways may usury be reserved? Who only can set up usury? Where note originally valid is sold at usurious discount, what is rule? What when note is an accommodation one, and why? What when notes are exchanged? What exception?

## PART II.

### CONTRACT IN ITS CONSTRUCTION.

§ 207. The law prescribes certain rules or canons of construction, in subjection to which all contracts are to be explained, applied, and enforced. The legal principles invoked for this purpose and presiding over this department of the law, although of vast importance to the practical lawyer, are yet of comparatively little to the business world. We shall therefore entirely omit the consideration of them here, and dismiss this part with the single remark, that the great primary object of attainment, and with reference to which all the canons of construction are adopted, is—*to arrive at the real intention of the parties, by a fair and reasonable construction of the terms they have employed in the contract.*

## PART III.

### CONTRACT IN ITS PERFORMANCE, OR THE DEFENCES THAT MAY BE INTERPOSED.

§ 208. The most of these are of great practical importance, and the knowledge of them of value to business men. The first in order naturally presenting itself is PERFORMANCE.

And the first inquiry is, Who is the party to perform? The answer is, that it is he who can entitle himself to be discharged from legal liability upon a contract, by the performance of a certain act. A party is to pay a sum of money. He is bound to go to the party entitled to receive it, and pay or tender the amount.

§ 209. In regard to the manner of performance, the rule is, that the execution of a legal contract must be according to its legal construction. Where it is in the *alternative*, the right to *elect* is the more usually with the promissor, although the strictly accurate rule may be stated to be—that the party who ought to do the first act is entitled to the election. Where the agreement itself presents an *alternative*, and one branch of it cannot in law be performed, the promissor is then bound to perform the other. One under obligation to do one of two things by a certain day, has, until the day is past, a right to make his election. But by suffering the day to pass without performing either, his right of election is lost.

§ 210. The contract must be performed according to its terms. A stipulation, for instance, merely for a deed or conveyance of real estate, is answered by the giving a quit-claim deed. But if the stipulation be to execute and deliver a *good and sufficient deed to convey the title*, that only admits of performance by giving such an one as will convey a good title. When an act is necessary to be done in order to enable another party to perform the contract, that act must first be done. *Downer v. Trissle*, 10 *Verm.* 541.

§ 211. In relation to *time of performance*. The general rule is, that where there is any agreement as to time when a contract is to be performed, the performance must be within or at that time. With the exception of negotiable paper, the term *month* is understood to mean a *lunar* and not a *calendar* one. In those cases where the time is to be computed from an act done, the day of doing it is excluded; and where the contract contains a stipulation for the per-

formance of an act at a future time, the party to perform may subject himself to a liability for non-performance by disabling himself from fulfilling the agreement.

§ 212. As to what will excuse non-performance, the rule is, that where the law devolves a duty upon a party, the performance of it shall be excused if it be rendered impossible by act of God. But where a party, by his own contract, absolutely engages to do an act, then prevention by inevitable accident will not excuse. A lessee covenants to repair, and the premises are injured or destroyed by lightning, fire, or wind. He is not discharged from his covenant, nor is the landlord prevented from recovering rent during the tenancy. *Allen v. Culver*, 3 Den. 284.

§ 213. If the contract be for the performance of an act which the promissor alone is competent to perform, and he is prevented by an act of God, the obligation is discharged. As an entire contract is incapable of apportionment, no partial performance of it can entitle to remuneration even where the completion is prevented by accident. But a claim *pro tanto* may sometimes arise upon a quantum meruit (as much as one merits) where the contract, as an entire one, is destroyed by the party who is to make the payment accepting and retaining the benefit of the partial performance, after the time for its completion has elapsed.

§ 214. When a condition precedent is clearly inferable from that contract, the plaintiff, before he can entitle himself to recover, must aver and prove either actual performance on his part, or an offer to perform which the defendant rejected; or his readiness to fulfil, until the defendant discharged him, or prevented his performance of it. In the case of *concurrent consideration*, the act to be done by each party being to occur at the same time, neither party can recover against the other without showing either a performance, or an offer, or a readiness to perform, his part of the agreement; or a wrongful discharge, or prevention of such performance, by the other party. But where the mutual



promises or contracts are *independent*, each party has his remedy on the covenant or promise in his favor, without performing his part of the contract.

§ 215. A question of great importance may arise as to when a party is at liberty to rescind a contract by reason of non-performance by the other party. Or, in other words, what kind or amount of non-performance by one will justify a rescinding by the other. In all those cases where a party fails to perform a condition precedent, the other party is clearly exonerated from performance on his part.

§ 216. It is not any slight omission of performance on one side, that will give to the other the right of rejecting entirely the contract, and of absolving himself from all obligation in relation to it. But in order to justify a total abandonment, the failure of the opposite party must be a total one, so total that the object of the contract is defeated or rendered unattainable by his misconduct or default.

§ 217. In all cases where there is an election to rescind a contract, the rule is—that it must be *wholly* or in *no part* rescinded. A party cannot treat it as void so far as to reclaim his property, and at the same time in force for the purpose of recovering damages. A familiar instance of this would present in a case where one party in an executory contract, does an act which will authorize the other party to rescind it. He then brings an action on an implied promise to recover a compensation for part performance, as though no special contract existed. Held, that he cannot at the same time claim under the contract, so as to entitle him to damages which he could not recover except by virtue of the contract. *Hill v. Greene*, 4 *Pick.* 114.

§ 218. The right of rescinding a contract vests only in the party who has been guilty of no default; and by him it can only be exercised within a reasonable time. But where the party who was to perform the condition precedent by a certain time, before the arrival of that time dis-

ables himself from performing it, the other party may immediately abandon the contract.

§ 219. To enable a party to rescind, and recover back money, as having been received to his use, one of two things is necessary :

1. The other party must concur in treating the agreement as abandoned *ab initio*, or

2. It must have been a part of the original agreement that, in a certain event, the power of rescinding and right to recover back such money should, by the terms of the contract, be vested in one of the parties.

§ 220. In an agreement which is of a continuing nature, and has been in part performed, the *further performance* of it may sometimes be excused, or even discharged, by such conduct on the part of the other party as is *wholly* at variance with the *spirit* of the contract. For instance, an author agrees to write articles for a periodical work, the publication of which is subsequently abandoned. He is not only discharged from the obligation of continuing to write, but may recover the value of whatever services he may have already rendered. *Planche v. Colburn*, 5 Carr. & Payne, 58.

§ 221. A very good rule to test the right of one of the parties to rescind a contract *in toto*, is to inquire whether, if rescinded, both parties will be placed in the identical situation which they occupied, and will stand upon the same terms as those which existed when the contract was made. If not, there can exist no right to rescind. Where there is a valid agreement to rescind a contract of sale, the same formalities of delivery, etc., are necessary to revest the property in the original vendor, which were required to complete the original contract of sale.

§ 222. Another defence which it becomes important to consider is that of PAYMENT; and the first inquiry here relates to the person to whom such payment can be safely made. This may be—

1. To the attorney of the creditor who is employed to collect the debt. But it should be to the attorney himself and not to his agent, as his retainer to collect is in the nature of a special authority.

2. To any agent of the creditor who is authorized to receive payments in the ordinary course of business.

3. To a person who to all appearance is intrusted with the business of the creditor, and whom the creditor permits to assume such appearance.

4. To a trustee, he having the legal title.

5. To one of several partners.

6. To one of several executors.

§ 223. The next inquiry regards the *amount* to be paid ; and the main question here is as to the effect of *part payment* of a debt, or a *promise of such*, in satisfaction of the *whole*. A difference is here recognized between paying the part in such satisfaction *before* the day at which the debt falls due, or *subsequently*. If *before*, or in a manner not provided for in the original agreement, and more advantageous to the creditor, there is then a new consideration, which will support a new promise. So the receipt of one thing, as a horse, in satisfaction for another, as a sum of money already due, is a good payment. So the acceptance of a new security, as the note or bond of a third person in satisfaction of a debt, although for a less amount, is a payment of the whole. So also the payment of a part in money, the creditor at the time executing to the debtor a discharge or release under seal of the whole debt, will preclude him from afterwards attempting the collection of it. And where a discharge not under seal, or technically a release, is given, it would probably be held sufficient. *Miliken v. Brown*, 1 *Rawle*, 397. But where the whole exists in contract, resting on an agreement to receive a part of a debt in satisfaction of the whole, the same being already due, there is no legal obligation incurred ; because there is no consideration to support such a contract. The whole

debt being due, there is no consideration to support a promise to receive a part in satisfaction.

§ 224. Another inquiry regards the time when *payment may be presumed*. The lapse of time, and other circumstances, independent of the statute of limitations, may sometimes afford grounds of presumption of payment. The following will serve as illustrations :

1. A receipt is given for rent due on a certain day. It affords *presumptive* evidence that the former rents have been regularly paid.

2. A highway tax for one year was not included in the bill for the next. Presumed to be paid.

3. A having a demand against B, the latter pays him money and takes a receipt in full of all accounts. A's demand is presumed paid.

4. An order to pay money is found in the hands of the drawee. Presumptive evidence of payment.

5. All debts, including specialties, or those under seal, may be presumed paid after the lapse of twenty years, unless circumstances are shown to rebut such an inference.

6. A check payable to the order of, and endorsed by the creditor, and in the hands of a third person, is presumptive evidence of payment ; but one payable to the creditor or bearer affords no proof of payment, unless it is also shown that the creditor or his agent actually received the money thereon.

7. An order is given by the creditor on the debtor, directing the money to be paid to a third person. This when acted upon, and the money paid in pursuance of it, will discharge the debt.

8. A payment made in counterfeit bills, or in bills on broken banks, is no satisfaction of the debt.

9. Money sent in a letter, properly directed by a debtor to his creditor, at the request of the latter, discharges the debt whether it be received or not. All the requisitions of

the Post-office Department to insure transmission must be complied with.

§ 225. Questions are very frequently arising relative to the *application to be made of payments* where money is paid in generally and there is an indebtedness on several accounts. This may occur where one debt is due on which there is no security, and another or others which are secured by the guarantee of responsible parties. When money is paid in such cases, its special application is governed by the following principles :

1. The debtor has the right, at the time he makes the payment, to apply it to whichever account he chooses, and the creditor, if he receive the money, is bound to acquiesce in such application. He is considered as receiving the money subject to it.

2. The circumstances under which the payment is made may also raise so plain an inference in regard to intention, as to be equivalent to an express declaration by the debtor. Suppose, for instance, that, at the time of the payment, the debtor denies one debt and admits the other, or the sum paid precisely agrees with one of the debts but not with the other.

3. If the debtor, at the time of the payment, makes no special application of it, and circumstances fail to show any clear intention on his part, it is then the right of the creditor to apply it to whichever of the demands he may choose. Even if one debt is barred by the statute of limitations, and the other is not, he may apply it on the debt so barred, but that will not have the effect of taking any balance out of the operation of the statute. There are cases in which, although the payment be general, yet the creditor is precluded from making the application. A creditor, for instance, has two accounts with the debtor, one as *executor*, the other *individual*. The law will not in such case permit him to make the application to any other than the individual account.

4. The case may occur where both the debtor and creditor fail to make any special application of the payment. The law then makes the application according to the justice and equity of the case. The following are some of the illustrations showing how this application is made :

A debtor makes a payment, and at the time owes a *prior legal debt*, and against whom exists also an *equitable demand* subsequent to such debt. Application is made to the *prior* debt.

At the time of the payment one debt is due, the other consists in a mere contingent liability. Application to the debt due.

One debt is due when the payment is made, the other not. Application to the former.

A debtor makes a payment generally on a note. It is first applied to extinguish the interest, and then what remains, if any, is applied on the principal.

There are two demands—one arising out of a *lawful contract*, the other out of a *usurious* or *unlawful one*. Application will be made to the legal demand.

A, a partner, owes a private debt to B. The firm in which A is a partner are also indebted to B. A pays *money of the firm* generally. The law applies it to the partnership debt.

§ 226. This doctrine of application never arises for consideration where there are not distinct accounts, or where all the parties treat *separate accounts* as *one entire account*. In all such cases, the effect of payments made generally is to discharge in succession the *earlier items*. Where, for instance, one of several partners dies, the firm being in debt, and the surviving partners continue their dealings with a particular creditor who joins the transactions of the old and new firm in one entire account, the payments which are from time to time made by the surviving partners, must be applied, as far as they go, first in extinguishment of the old debt. Neither has this doctrine any application except to cases



EFFECT OF RECEIPT.

where the debtor has an opportunity of applying his payment, but neglects to do so. And hence, where an attorney, by collecting, received money belonging to his client, it was held that he could not make the application, as the client had not had the opportunity of first making it himself. *Waller v. Lacy*, 8 Dowl. P. C. 563. An agent having blended a demand due to his principal with one due to himself, receives a general remittance from the debtor. It shall be applied towards the discharge of both debts *pro rata*. And if several notes are joined in one suit, and the execution issued on the judgment obtained therein is satisfied only in part, a surety on some of the notes may insist on a proportional application of the money. Several principles in regard to application of payments decided in *Allen v. Culver*, 3 Denio, 284.

§ 227. The conclusiveness of a *receipt* given on the payment of money has often come up for settlement; and the general rule is, that a receipt or other acknowledgment not being under seal, amounts to no higher than presumptive evidence, that the money therein mentioned has been paid. It may be disproved on the ground of fraud or mistake of facts; and although some doubt as to the right to contradict its terms by parol evidence may possibly arise out of *Egleston v. Knickerbocker*, 6 Barb. 458, yet since the case of *Wadsworth v. Allcott*, 2 Seld. 64, the right of introducing parol evidence to vary and even contradict its terms cannot well be doubted. If, however, a receipt be also in the nature of a contract, it is so far within the general rule, and is not liable to be varied by parol evidence. An instance of this is a bill of lading having a twofold aspect, a receipt of the goods, and also a contract to carry and deliver. 2 Cowen & Hill's *Notes to Phillips' Evidence*, 1439.

§ 228. The *third defence* that may be interposed is in legal language termed ACCORD AND SATISFACTION—*settlement perfected*. Several questions arise here of interest both to

the business and professional man, and the first regards the effect of *accord without satisfaction*. The rule here is, that the one existing without the other is no extinguishment of a debt, no bar to an action. An accord to make satisfaction at a future day, has no effect upon the original debt, unless the satisfaction be done and accepted. An accord or agreement to render satisfaction at a future day, in order to be effectual in barring an action on the original demand, must be founded on a new consideration, and be so far binding on the debtor as to afford the creditor a fresh right of action for its non-performance. For instance, an accord *with mutual promises to perform* is good, although the thing be *not performed* at the time of the action, because, in such case, the party has a *remedy* to compel performance. But the test of the sufficiency of that remedy is, that the party might have taken it upon the mutual promise at the time of the agreement. Mere *executory* agreements do not avail to discharge the debts until they are *executed*, unless it is clear that the *promise*, and not the *performance*, is agreed to be the satisfaction.

§ 229. If done before breach of the original agreement, a substituted executory agreement is a good defence; but unless performance be shown, it should not be set up as an accord and satisfaction. *Good v. Cheeseman*, 2 B. & Ad. 328. Where a bond, or other specialty, is taken for or on account of a simple contract debt, unless clearly as collateral security, the latter becomes merged in the former, and no action can be sustained upon it. One quality of a satisfaction to render it sufficient, is that it be *advantageous* to the party agreeing to receive it. It would be adjudged inoperative, if it could not possibly afford him any equivalent benefit.

§ 230. A *release* as evidence of accord and satisfaction may be either—1. By act of the parties; or 2. By act of the law. Technically it should be under seal, which of itself imports a consideration. A parol contract may, be-



fore any breach, be released by parol; but a sealed contract, in order to be released, requires either a sealed release, or a parol release, founded upon a sufficient consideration.

§ 231. Although the payment of part of a debt as a satisfaction of the whole is not sufficient, unless there be a release, yet it is otherwise in a composition arrangement made between a debtor and his creditors. Such an arrangement being made with other creditors and the debtor, the creditor, in common with the others, receiving a part of his demand as a composition or in full; that of itself is an extinguishment without a release. It would be a fraud on the other creditors to allow him to seek to enforce the balance.

§ 232. A creditor receiving a part of his debt from a third person, who pays in the expectation that the debtor shall not be molested for the remainder, cannot afterwards recover the balance, although there be no release.

§ 233. As a general principle a *sealed executory contract* cannot be released or rescinded by a *parol executory contract*, but *after breach* of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject-matter, or by any valid parol executed contract. *Delacroix v. Bulkley*, 13 Wend. 71.

§ 234. No particular form of words is necessary to constitute a valid release. There must exist the evident intention on the part of the creditor to renounce the claim, or discharge the debtor. A covenant not to sue, without limitation as to time, is legally tantamount to a release. So also an indemnity by the creditor against all claim for or on account of the debt, operates as a release.

§ 235. A question not unfrequently presents itself as to the operation of a release. Upon what does a release operate? The answer is that technically it only operates on a present interest. But a present vested right to take effect in the future, may be the subject of a release. *Woods*

v. *Williams*, 9 *Johns*. 123. A release of the principal money operates as a release of the interest.

§ 236. A release by one of several *joint* creditors is a discharge of the debt. But such release by a partner, in consideration of a debt due from him individually, will not discharge the partnership debt. *Gram. v. Cadwell*, 5 *Cowen*, 489.

§ 237. A technical release under seal, to one of several *joint debtors*, is a release of the debt. And the same effect also is produced, although the obligation or agreement be *several* as well as *joint*. But a release to the representative of a deceased joint debtor does not operate as such to the survivor, as he is no surety, but legally liable for the payment of the debt. It is competent, however, in a release to one of several joint contractors, so to restrain its operation by the express terms of the instrument, as to limit its effect to one without discharging the others. *Solly v. Forbes*, 2 *Ball & Baty*, 38.

§ 238. An instance of a release or discharge by operation of law, occurs where higher security is taken; as a specialty, or instrument under seal, for a simple contract debt. This effects a merger and extinguishment of the latter. This always occurs unless the higher security is taken simply as *additional* or *collateral* security, in which case the remedy is perfect upon both.

§ 239. Another instance falling within the same general principle, occurs where a *material alteration* has been made in it without his consent. To illustrate—where a petition describing the particular courses of a road between two termini was, after being signed, so altered as to retain the same termini, but to leave its intermediate courses to a locating committee, it was held to absolve all those petitioners whose private interests it might injuriously affect. *Jewett v. Hogdon*, 3 *Greenleaf*, 103.

§ 240. The effect of a trifling or unimportant alteration, not affecting the sense or operation of the instrument, will

depend much upon the nature and extent of it, the party making it, and the circumstances under which it was made. The law, as settled in the older cases, held alteration by the obligee or the party owning it, although in an immaterial part, to avoid the instrument. An alteration by a stranger in an immaterial part would never have produced that effect. In this country the principle has been very generally adopted, that an immaterial alteration will not avoid an instrument, by whomsoever it may be made. 8 *New Hampshire*, 139; 8 *Cowen*, 71. Even a material alteration made by a stranger, has been held not to render the instrument inoperative. 10 *Conn.* 192; *Rees v. Overbagh*, 6 *Cowen*, 746. The loss, cancellation, or destruction of an instrument occurring through mistake or accident, even by the party interested, will not now discharge the contracting party from liability, except in the case of such negotiable paper as is transferable by delivery.

§ 241. In the absence of all positive testimony, the question has arisen as to *when* any alteration shall be presumed to have been made. The question is one of vast importance, because, if *prior to execution*, although material, it will not affect the validity of the instrument. The *subsequent execution* of the instrument would render it *subject to the alteration*. If *subsequent*, it might avoid the instrument. The decisions on this point have not been uniform, but the better opinion seems now to be, that whether *prior* or *subsequent* is properly a question of fact for the jury.

§ 242. Another species of defence is—the PENDENCY OF ANOTHER ACTION, OR JUDGMENT BEFORE RECOVERED FOR THE SAME CAUSE OF ACTION. In reference to the first, the mere pendency of an action does not operate to extinguish the contract upon which it is brought, but it will have the effect to suspend a resort to any other action until its determination. But the obtaining a judgment merges in it the claim upon which the action was brought, and extinguishes it, so

that it may be interposed as a bar to any other action brought for the same cause.

§ 243. Another defence briefly to be noticed is ARBITRAMENT AND AWARD. The rule here is, that whenever the claim is for unliquidated damages, and an award has been made upon a submission giving mutual remedies between the parties, in case of non-performance the plea of arbitrament and award may be successfully interposed. But where the action is brought for a debt, and the award has simply ascertained its existence and amount, the plea must go further, and aver performance of the award. *Allen v. Milner*, 2 *Crompton & Jervis*, 47. Where there is a clause introduced into the agreement, that if any dispute should arise, the matter in difference should be referred to arbitration, this constitutes no defence to an action. *Goldstone v. Osborne*, 2 *Carr. & Payne*, 550.

§ 244. Another defence is TENDER, which to be good requires the actual production of the money, unless it be expressly dispensed with. It must be an absolute and unconditional offer to pay. It must be for the whole amount of the debt, unless there are separate and distinct sums of money due, and then it may be for any one or more of the sums, stating definitely which. The tender is only legal when made in money or in coin; but if made in bank bills it will be held sufficient, unless objection is made upon that ground.

§ 245. Another defence which business men, as well as the profession, are much interested in understanding, is that of the STATUTE OF LIMITATIONS. This has been termed a "*statute of repose*." It quiets all claims after a certain period of time. It is a perfect bar to all actions which are not prosecuted within a certain limited period, after the cause of action had accrued. This period is different in different States, and in the same State varies with the different species of demand. In the State of New York, in all demands arising out of contract, express or implied, the

period is six years. It is purely a creature of statute, and hence varies in different states and nations. Without stating the particular provisions of the statute, which are so different in different States, I shall refer to some of the well-settled principles that have an application to all those provisions.

§ 246. This statute, in regard to its effect, is never held to *discharge* or *extinguish* the debt. It simply bars all remedy for its recovery. Hence it affects no lien that may exist in the way of security for the same debt. The right to a pledge or pawn remains perfect, although the recovery of the debt it was given to secure, would otherwise have been barred by the statute.

§ 247. The statute begins to run from the day upon which the creditor might have commenced an action for the recovery of his demand, such day being included in the computation of time. When a contract is to do a thing at a future time, the statute will commence running from the breach. In case of indemnity, the statute only runs from the time of payment under it; and in those cases where a surety claims contribution from his co-surety, the statute does not begin to run until he has paid something beyond his own proportion of the debt. A factor who has sold consigned goods is only liable from the time demand is made upon him to account. In case of a promissory note payable *on demand*, the statute runs from the date of the note, and of a special contract from the time of its breach. Where, however, a bill or note is made payable at a particular place, no cause of action arises, and hence the statute does not begin to run, until demand made at that place. In the State of New York, when a fraud has been perpetrated, which remains for some time concealed, the statute begins to run from the time the fraud was discovered.

§ 248. Once commenced, the statute continues running until the action is either commenced, or barred by it. If, however, the debtor is absent from the state at the time the debt falls due, the statute does not commence to run until

his return ; and in the State of New York the time during which he may be absent and reside out of the State, after it has so commenced, forms no part of that period of time which is to constitute the bar.

§ 249. As the statute of limitations only *bars the remedy*, without *extinguishing the debt*, the *moral obligation* still remains, and hence a *new promise*, without any *new consideration*, will revive the original liability. In order, however, to have this effect, there must be something besides a mere admission ; there must be an *express promise* to pay. This devolving so much upon the promise naturally resulted in rendering the recovery dependent upon the nature and effect of it ; and hence, if that was a *conditional one*, to exclude the right of recovery unless that condition was shown to be complied with. A promise, for instance, to pay *when able*, devolved upon the plaintiff the necessity of proving that ability before he could be permitted to recover. In this state the promise is required to be in writing, and signed by the debtor, in order to avoid the provisions of the statute. The promise need not specify any particular sum, as the amount due may be proved by other evidence.

§ 250. It is also a rule that a part payment of the debt will take the remainder out of the statute. In order to have this effect, the party paying must himself apply his payment on the debt. A payment on account of interest will have the same effect as on that of principal. The part payment may also be in goods as well as money. Indorsements on a promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date. One partner in the State of New York cannot, after dissolution of the partnership, by any promise or part payment, revive the debt as against the other partner.

§ 251. Another question, that, under a recent decision in the State of New York, may still be regarded as doubtful, relates to the effect upon a *joint debt* of part payment by one of the two or more *joint debtors*. Under

certain limitations or qualifications, it has generally been considered that such payment by one operated to revive the debt against the other or others. But in the State of New York it has been recently held in its highest court, that payments upon a note by one of its *joint and several* makers, and indorsed upon it before the statute was a bar, did not affect the defence of the statute as to the other. *Shoemaker v. Benedict*, 1 *Kern.*, 176.

§ 252. Another defence, often interposed, is A SET-OFF. This does not consist in a reduction of the plaintiff's demand, nor of matter of defence growing out of his claim. It is an independent debt due from the plaintiff to the defendant, and one for the recovery of which a cross action might be maintained by the latter against the former.

§ 253. A set-off is a creature of the statute, not existing at common law. The defendant may interpose it as a defence to an action brought against him, or he may reserve it and institute himself a suit for its recovery. No debt can be the subject of set-off unless actually due and in arrear at the time of the commencement of the action.

§ 254. The debt sought to be recovered, and that proposed to be set off, need not be of the same nature or degree, but they must be mutual, and due in the same right; hence one of several defendants cannot set off a debt due to him alone from the plaintiff; nor can the defendant set off a debt due to him from one of several plaintiffs. A defendant who is sued as executor or administrator cannot set off a debt due to him personally. Nor can a person who is sued for his own debt, set off a debt which accrued to him in his representative character. A mere equitable demand cannot be the subject of set-off at law.

§ 255. A defence somewhat analogous to that last mentioned, and which is of comparatively recent introduction into our jurisprudence, is RECOUPMENT. This consists in a right recognized in the defendant to set up the damages he has sustained in consequence of a violation by the plaintiff

of some stipulation embraced in the same contract or matter out of which the plaintiff's right of action arises. The defendant has a right of action for the recovery of all such damages; but he may also, if he so elects, recoup (cut off) the plaintiff's damages by as much as those suffered by him against the plaintiff, growing out of the same transaction, will amount to. A brings an action against B upon a promissory note. Defence—that the note was given in payment of wood purchased standing, the vendor of it agreeing to indemnify the vendees against any damage that might happen to the wood in consequence of the burning of an adjoining fallow. The fallow being afterwards burnt, the wood, which constituted the consideration of the note, was destroyed by the fire. Held that the vendees might recoup. *Batterman v. Pierce*, 3 *Hill*, 171. It was also settled—

1. That the right of recoupment was not confined to cases of fraud, but extends also to those of mere breach of contract.

2. Recoupment is admissible, though the damages on both sides are unliquidated.

3. The defendant may elect whether he will use his claim in that way, or reserve it for a cross action.

4. When he elects to recoup, he cannot have a balance certified in his favor, as in the case of a set-off.

5. He cannot, after having been allowed part of his claim by way of recoupment, maintain a cross action for the residue.

§ 256. The knowledge of the law of contract is necessarily very imperfect without understanding something of the nature of the DAMAGES which result from its non-performance. The only compensation which the law has in its power to render to those who suffer from a breach of contract, is the award of damages. Chancery can offer other remedies. It can perpetually enjoin parties from future violations; or it can decree that contracts shall be specifi-



cally performed. Thus between both, the remedies afforded are quite complete. Neither will concede to itself but what its compensatory powers are adequate for every emergency. Hence parties are always at liberty to break their contracts equally as to keep them, and there is no more legal morality in the one than in the other. The parties by keeping, render any appeal to the law unnecessary. By breaking, it becomes necessary to make the appeal, and such compensatory damages are awarded, or other remedial means in chancery granted, as will place the party injured in the same situation as if the other had fully performed the contract. Thus damages are made to come in the place of performance, and the law considers one as exactly equivalent to the other.

§ 257. The first question that properly presents itself, and one productive of great difficulty in settling, is whether a *certain sum specified* is to be considered in the nature of a *penalty*, or of *liquidated damages*. It is entirely competent for contracting parties to do either one of two things, viz. : to insert in the instrument a certain sum as a penalty to be forfeited in case of non-performance, and under which the party recovers the damages that have been actually sustained ; or, to provide, in anticipation, for the damages which either will sustain in case of a violation of the contract by the other. The latter is called liquidated damages.

§ 258. The leaning of the courts has ever been towards regarding the sum inserted in the contract as a penalty, under which the actual damages should be recovered. Where the agreement provides that a certain sum shall be paid in the event of performance or non-performance of a certain specified act, in regard to which damages, in their nature uncertain, may arise in case of default, and there are no words evincing an intention that the sum reserved in case of a breach shall be viewed only as a penalty, such sum may be recovered as liquidated damages. *Lowe v. Peers*, 4 Burr. 2225.

§ 259. Although there are some exceptions, yet it may be stated as a general principle, that where a certain sum is agreed to be paid, in case of the non-performance of a specified act, and it be reserved *as a penalty* by name, it cannot be viewed as liquidated damages; the word penalty evidencing a contrary intention. Even where the language used was in the *penal sum of \$500 as and by way of liquidated damages*, it was held a penalty. *Davies v. Benton*, 6 *Barn. & Cress.* 216.

§ 260. In this country in all cases where the question has arisen, the leaning has strongly been towards treating a fixed sum as a penalty, and not as liquidated damages. But wherever the clear intention of the parties proclaims that liquidated damages was the thing intended, both law and equity must give such effect to the stipulation, however severe it may operate upon one of the parties. The general principles deducible from the cases may be stated to be

1. The language of the agreement is not held to be conclusive, and the effort of the tribunal will be to get at the intent of the parties.

2. When the agreement is in the alternative, to do an act or pay a given sum of money, the court will hold the party failing, to have had his election, and will compel him to pay the money.

3. In case of an agreement to do some act, and upon failure, to pay a sum of money, the court will look into the intent of the parties; that no particular phraseology will be held to govern absolutely, and that although the term "*liquidated damages*" will not be conclusive, the phrase "*penalty*" will generally be so.

4. If the sum be evidently fixed to evade the usury laws, or any other statutory provision, or to cloak oppression, the courts will relieve by treating it as a penalty.

5. Whenever the sum stipulated is to be paid on the

non-payment of a less sum made payable by the same instrument, then it will always be treated as a penalty.

6. Where, independently of the stipulations the damages would be wholly uncertain and incapable of being ascertained, except by conjecture, there the damages will usually be considered liquidated, if they are so denominated in the instrument. *Dakin v. Williams*, 22 *Wend.* 201. *Pearson v. Williams*, 26 *Wend.* 630. *Lampman v. Cochran*, 16 *New York Rep.* 275. *Bagley v. Peddie*, 16 *New York Rep.* 469. *Cotheal v. Talmage*, 5 *Seld.* 551.

§ 261. In a very large class of actions, the entire claim is for damages. In these cases, as where actions are brought on negotiable paper, the contract itself furnishes the rule of damages. There is quite a large class of cases in which no other damages can be recovered, than such as are nominal. This occurs wherever a right is invaded, or a cause of action comes to exist, and no actual damage is suffered.

§ 262. It is often a matter of great difficulty to fix the limit of compensation. The law refuses to take into consideration any damages remotely or consequentially resulting from the act complained of. The civil law held the defendant liable for those damages only which both parties may fairly be supposed, at the time, to have contemplated as likely to result from the nature of the agreement.

§ 263. The extent of liability is sometimes dependent upon the peculiar circumstances under which a man acts. A carpenter sells timber for the express purpose of propping up a house. The timber proves defective and the building falls. The carpenter is liable. But the same timber sold in good faith by a man not a carpenter, would only render him liable for the difference in price between the good timber and that sold.

§ 264. In cases of wrongs, torts, and wilful injuries, damages may be given by way of punishment of the wrong doer. But in cases of contract, except promises to marry, only compensatory damages are given, those alone which

are the natural and proximate consequence of the act complained of.

§ 265. A question which has given rise to a good deal of discussion, relates to the loss of profits consequent upon a breach of contract,—whether such loss can be given as damages. The rule is, that remote or speculative profits cannot be recovered by way of damages. But all profits are not excluded as remote and speculative. Those profits, or advantages, which are the direct and immediate fruits of the contract, are recoverable as damages. They enter into and form a part of the contract itself, and are presumed to have been taken into consideration, when it was made, forming, perhaps, the chief or only inducement to the arrangement. *Masterton v. Mayor of Brooklyn*, 7th Hill, 62.

§ 266. Another question relates to the right to recover damages that have occurred subsequent to the commencement of the suit. The old rule adopted and adhered to down to the time of Lord Mansfield was, that even interest on a demand could only be recovered down to the time of commencing the suit. In a case where the plaintiff recovers only nominal damages, he can give in evidence those consequences of the act which are immediately traceable to it, although their occurrence has been since the suit was commenced. And so also he is entitled to recover for those direct and immediate consequences of the act complained of which are so closely connected with it, that they would not, of themselves, furnish a distinct cause of action.

§ 267. By a systematic arrangement of the cases that present questions of damages, three different classes have been specified :

1. Those where the contract is only for the payment of money. There the consequences of non-performance cannot be inquired into in any way, however severe they may have been. The only recovery by way of damages is the interest on the money due.

2. Those where the contract is to do, or to refrain from

doing, some particular thing. Here the rule of the civil law is adopted, viz.: that the defaulting party shall be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time of the agreement.

3. Those where a tort or wrong is committed, or the action is brought for a violation of right, unattended by any of those circumstances of aggravation which give the control of the matter to the jury. These are, by far, the most difficult to reduce to settled principles; they can hardly be said to be included under contract.

§ 268. In all cases of contract the great object of the court is to ascertain the agreement of the parties, and that, once arrived at, as a general rule controls the measure of remuneration. But this principle is liable to some modifications; as,

1. In the case of unconscionable bargains. Where, for instance, in shoeing a horse, the contract was to give a barleycorn for the first nail, two for the second, four for the third, and so on, doubling each time for thirty-two nails. The sum thus agreed to be paid would be enormous; and the court, in the exercise of a power devolved upon it by necessity, would direct the giving a fair reasonable compensation.

2. The second modification or exception embraces all covenants of warranty on sale of real estate. In such case, the rule is different in England and in this country. In the former the ordinary principle upon which damages are given is carried out, and those recoverable consist of the actual injury sustained. But in this country the measure of damages is held to be the re-payment of the sum of money paid, together with the interest thereon, from the time of its payment. The reason of this deviation from the rule with us is, that in a country so rapidly developing as our own, no one would sell land with covenants of warranty, if in case of failure of title he was to be held responsible for all the consequential damages.

3. The third exception embraces all that class of cases where the contract, being performed only in part, the court undertakes to dispense with the remainder of the agreement, and to give compensation for what has been actually done. The following instances will illustrate this class: A agrees to work for B for a specified time for a given sum, and quits his employment, without B's consent, before the time expires.

A agrees to erect a building for B according to certain specifications. The work is done, but the specifications are, in many instances, departed from.

In these, and such like cases, where the plaintiff is entitled to recover, the agreement of the parties, so far as it can be followed, must always be taken to furnish the measure of remuneration.

§ 269. If a contract be broken and the party entitled to the benefit of it can protect himself from the loss consequent on its breach, at a trifling expense, or with reasonable exertions, it is his duty to do it; and he can charge the delinquent party with such damages only as with reasonable endeavors and expense he could not prevent.

### QUESTIONS.

What is the primary object to be attained in the construction of contracts? What is the first defence that may be interposed? What the first inquiry under it? What the answer? What the illustration? What rule relating to the manner of performance? When in the alternative where the right to elect? Where in alternative, and one branch cannot be performed? What rule, when one of two things to be done by a certain day? How must contract be performed? What illustrations? How, when an act is to be done to enable the other party to perform the contract? What rule as to time of performance? What does the term month mean, and what exception? What is the rule when time is computable from an act done? How can a party render himself immediately liable when an act is to be done at a future time? What will excuse non-performance? How when a party absolutely engages to do an act? What illustration? How where the contracting party is alone competent to perform? What is the rule where the con-

tract is entire? How may a claim *pro-tanto* sometimes arise? How where there is a condition precedent? Where there are concurrent considerations? Where there are independent considerations? What will justify a party in rescinding? What will justify a total abandonment? What is the rule where there exists the right to rescind? What illustration? In what party only does the right to rescind vest? When is it to be exercised? When may the party immediately abandon the contract? What is necessary to enable a party to rescind and recover back money? How may a further performance of a contract be sometimes excused or discharged? What illustration? What rule to test parties' right to rescind? What to be done on rescinding contract of sale? What defence may be next interposed? To whom may payment be safely made? When is there a difference in the effect of part-payment made or promised for the whole debt? What effect has the receipt of one thing in satisfaction for another? What the acceptance of a new security? What of part payment and release? What the promise of part, the whole being due? When may payment be presumed? What illustrations? When arise questions of application of payments? What is the right of the debtor, and when to be exercised? What presumption may circumstances raise? What instance? What is the right of the creditor, and under what circumstances? How, when debt is barred by statute of limitations? And with what effect? When cannot creditor make application? How, where neither debtor nor creditor makes application? What instances? When only does the doctrine of application arise? What rule when an agent has blended a demand due his principal with one due to himself? How is a receipt regarded in law, and subject to what? How if in the nature of a contract? What is accord and satisfaction? What is the rule as to accord without satisfaction? When is an accord to render satisfaction at a future day effectual in barring an action? When is a substituted executory agreement a good defence? When is there a merger? How must satisfaction be to be sufficient? In what two modes may a release be given? How should it be? When and how may a parol contract be released? When may a contract under seal? What effect has a composition arrangement between debtor and creditor? Why? When cannot creditor recover balance when a part of the debt is paid? What is the general principle as to a sealed executory contract? What after breach? What unnecessary to constitute release? What must exist as to intention? What effect of covenant not to sue? What of indemnity? Upon what does release operate? What effect of release by one of several joint debtors? What to one of several joint debtors? What to representative of deceased joint debtor? What instance of

release or discharge by operation of law? What effect has material alteration in instrument and by whom? And slight alteration and by whom? When is alteration presumptively made? What effect has the pendency of another action for same cause? What the obtaining of judgment? What the rule in case of arbitrament and award? What necessary to make a good tender? What effect has statute of limitations? What does it do in reference to the debt? When does it commence running? When in case the contract is to do an act at a future time? When in case of indemnity? When in case of surety? When in case of goods consigned to factor? When in case of promissory note on demand? What exception? How long does statute run? What is the rule when the debtor is absent or non-resident? What will revive a debt barred by statute? How must the promise be? What is the recovery dependent upon? What illustrations? What necessary in the State of New York? What effect has part payment of debt? What necessary to have this effect? How may part payment be? What the presumption in case of endorsements on note? What effect upon joint debt of part payment by joint debtor? What is a set off? Is it obligatory to set it up? What is not, and what is, necessary in order that there may be a set off? What does recoupment consist in? What case will illustrate? What principles settled in relation to it? What is the only compensation which the law can offer? What can chancery? When, and under what circumstances, is a sum certain inserted in an instrument to be considered as a penalty, and when as liquidated damages? What is the leaning of the law? What general principles deducible from the cases? When is the entire claim for damages? What are nominal damages? What rule of the civil law as to limit of compensation? When may extent of liability depend upon peculiar circumstances, and what? How and for what, are damages given in case of wrongs? How in cases of contract? What is the rule as to giving loss of profits by way of damages? When are damages occurring subsequent to commencement of suit to be given? What consequences of act complained of are recoverable? What three classes of cases are there in which questions concerning damages may arise? What controls in all cases of contract? What modifications of the principle? What the rule when a party can protect himself by a slight expense?

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## CHAPTER II.

## NEGOTIABLE PAPER.

This is the great instrument of commerce, and the importance of the functions performed by it in the mercantile world renders it difficult to understand how it could have been possible for the ancients to have carried on their business transactions without its use. It seems to have commenced its agency on the coasts of the Mediterranean in the fourteenth century, and from that period to the present, it has been growing in importance as the business affairs of the world have increased in number and magnitude. To the merchant and man of business it now presents a branch of the law, the accurate knowledge of which may be well deemed a necessity.

The origin of the principles that apply to negotiable paper shows its peculiar mercantile character. With the exception of a few legislative enactments, they are all derived from mercantile usage, from the custom of merchants, which in this department of the law has always been permitted to control, subject only to legislation. This custom or usage has here given that definiteness and extreme precision which is elsewhere due to legislative enactment.

## PART I.

## ITS DIFFERENT KINDS, THEIR FORMS AND PARTIES.

§ 270. The Bill of Exchange is the original germ from which all the different kinds of negotiable paper have proceeded. All the essential principles that have an application to the latter have grown out of the use and full development of this instrument. And yet there is quite an apparent difference between two at least of the forms of this kind of paper. In order more clearly to present this subject I shall give first the forms of the three different kinds that

are the most commonly in use, viz. : the Bill of Exchange, the Promissory Note, and the Check.

## BILL OF EXCHANGE.

NEW YORK, *June 1, 1860.*

\$100.

At sight, (or on demand, or at — days after sight, or at — days after date,) pay to James Taylor, or order, (or bearer,) one hundred dollars for value received.

JOHN STEARNS.

To Mr. Thomas Jones, Merchant at Buffalo, N. Y.

## PROMISSORY NOTE.

NEW YORK, *June 1, 1860.*

\$100.

Two months after date, I promise to pay James Burt, or order, one hundred dollars value received:

CHARLES SAND.

## CHECK.

NEW YORK, *June 1, 1860.*

Mechanics and Farmers Bank pay to Ira Shafer, or bearer, one hundred dollars.

\$100.

LEVI WARD.

§ 271. A bill of exchange, in its simplest form, is a written order, or open letter of request written by one merchant and directed to another, requesting him to pay a sum of money therein mentioned to a third merchant or his order or to bearer. The writer of it, John Stearns, is called the *Drawer*, the person to whom it is directed, Thomas Jones, the *Drawee*, and the person in whose favor the bill is drawn, or to whom the money is to be paid, James Taylor, the *Payee*. The theory of it is that Thomas Jones the Drawee, is indebted to John Stearns, the drawer in the sum of \$100, and

John Stearns, owing a similar debt to James Taylor, avails himself of this instrumentality, to pay his own creditor by transferring to him a debt due to himself. The payee, Taylor, by taking this open letter to the drawee, Jones, receives his \$100, transferring to him the bill, as his voucher for its payment, and thus both debts are paid.

§ 272. Almost the entire transactions of the mercantile world are based upon credit, and hence the evidences of debt, when put into a negotiable form, perform a function among business men more important than money. It is upon this principle that the bill of exchange receives its further development, by means of which its great utility as a commercial instrument is secured. This development is commenced by the *drawee*, Thomas Jones, who, when it is drawn upon time, instead of paying, accepts it, by writing across the face of the bill "Accepted," and signing his name. We have now another party to the bill, or rather a transformation of one party into another; for Jones, at first a drawee, has now become the *acceptor*. This act of acceptance fixes his liability, and gives to him as a party on the bill the character of principal debtor. He admits his indebtedness to the drawer by his acceptance.

§ 273. The bill having now a party on it who admits himself a debtor and promises to pay his debt, is in a fitting condition to be launched into the business world, and to enter upon its mission as an instrument of commerce. James Taylor, the payee, has now in his possession an agent that will either command money, or become itself a substitute for it. To enable it to accomplish this purpose, he writes his name across the back of the bill, and thus adds a new party, or rather transforms the *payee* into the *indorser*. He then delivers it to another party, by way of paying a debt, or purchasing goods, or procuring money upon its discount, and this last is termed the *indorsee*, or more generally the *holder*. This one may do the same to another, and so on ad infinitum. These constitute all the parties to the bill.

§ 274. A promissory note is a promise in writing to pay a specified sum, at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or bearer. This has no apparent analogy to a bill of exchange, and has never been recognized at common law as any thing more than a contract. An attempt was made in the time of Lord Holt, to place the promissory note on the same footing as the bill of exchange, and render it transferable by the custom of merchants, but it utterly failed. The necessity of bringing it within that custom, and thus of enabling it to fulfil the purposes of negotiable paper, led to the passage of the statute of Anne, which placed promissory notes on the same footing with bills of exchange. This statute has in substance been re-enacted in most of the States, but in some few of them it has not, and in all such they remain the same as before the statute of Anne, the rights and liabilities of an indorser being the same as those of the assignor of a bond. In a promissory note, the signer, Charles Sand, is called the *maker*, and James Burt, to whose order it is made payable, the *payee*.

§ 275. The promissory note in the hands of the payee becomes substantially the same as a bill of exchange in the hands of its payee; the maker, by signing the former, acknowledging himself as the principal debtor, in the same manner that the acceptor does by accepting the latter. The latter, it is true, has the addition of the drawer, but his rights and liabilities are substantially the same as those of an indorser. The payee of a note, like that of a bill, holds it as an evidence of indebtedness by the maker, and may transfer it for the accomplishment of his various business purposes by writing his name upon the back of it, thus transforming himself from payee into *indorser*, and rendering the party to whom he delivers it the *indorsee* or *holder*.

§ 276. Thus, however little resemblance there may have been between the bill of exchange and the promissory note

in their original shape, yet in the hands of the payee of each, when ready to be put into circulation, they are, in principle, precisely analogous. The analogy consists in this, that the payee, and each subsequent indorsee or holder of the note, by indorsing and delivering it to his immediate indorsee or holder, in effect draws a new bill upon the maker in favor of the indorsee to whom he delivers it, and who by receiving it, so indorsed, comes to occupy precisely the position of the payee in the bill of exchange. Hence both these forms of negotiable paper, in the great offices they perform in the business world, are brought under the dominion of the same general principles of law.

§ 277. A bank check is a written order, addressed to a bank or a person carrying on the banking business, directing the payment of a certain sum of money on presentment, to a person therein named, or to bearer. The law is less clearly settled relating to several points concerning a check than the other two forms of negotiable paper. The first conflict in decision relates to the inquiry whether a check, *to be such*, must necessarily be payable to bearer; or whether it may be payable to order also. In *Woodruff v. The Merchants Bank of the City of New York*, 25 *Wend.* 673, it was held that it must be payable to bearer; that making it payable to order rendered it a bill of exchange. But in the *matter of Brown*, 2 *Story, C. C. Rep.* 502, Judge Story inclines to the opinion that it is not requisite to a check that it should be payable to bearer or on demand.

§ 278. Another and more important point of difference relates to the inquiry as to how far a check, in regard to the principles that govern it, is to be considered analogous to bills of exchange and promissory notes. In *Harker v. Anderson*, 21 *Wend.* 373, it is placed in all respects upon the same footing. In the later cases of *Murray v. Judah*, 6 *Cowen*, 490; and *Little v. Phoenix Bank*, 2 *Hill*, 425, it is held that different principles prevail so far as the drawer is concerned, and that the want of due presentment and

notice of non-payment, will only exonerate the drawer so far as it occasioned any actual damage to him. These cases, however, hold that the indorser is on the same footing in all the forms of negotiable paper.

§ 279. It will be seen that a check is very analogous in its form to a bill of exchange. The differences pointed out in the *matter of Brown, 2 Story*, 502, are—

1. That checks are always drawn upon a bank or banker.

2. That they are payable immediately on presentment, and without days of grace.

3. That they are not presentable for acceptance, but only for payment.

4. That the omission to demand and give notice could only be available as a defence to the drawer so far as he had received an injury thereby. In the recent case of *Bowen v. Newell*, 4 *Seld.* 190, it is held not material to constitute a check that it should be drawn upon a bank or bankers, but that it should be payable immediately on presentment. The check, like the bill of exchange, has its *drawer*, Levi Ward, the party upon whom it is drawn, usually a bank or banker, and the party in whose favor it is drawn, Ira Shafer, the *drawee*.

§ 280. Bills of exchange are either *foreign* or *inland*. A *foreign* bill is one drawn in one country and made payable in another; an *inland*, one drawn and made payable in the same country. A bill drawn in one State and made payable in another, is a foreign bill of exchange. *Buckner v. Finley*, 2 *Peters*, 586.

§ 281. There may be two classes of parties on negotiable paper. The one embraces those who are *primarily* liable, who are the real debtors, and who are *absolutely* liable for the full face of the paper to the payee, indorsee, or holder, however he may have neglected to demand payment and give notice of non-payment. These are the acceptor of the bill and the maker of the note. The other includes those

who are *secondarily* liable, whose liability is *contingent*, and who are discharged entirely if the holder fails to make the proper demand of payment, and give the required notice in case of non-payment. These are the indorser and drawer. This distinction must be kept constantly in view in order to arrive at any satisfactory understanding regarding the law of negotiable paper.

§ 282. There is another division of negotiable paper important to notice, and that is into *business* and *accommodation*. That is termed *business* which is given for value, when the maker of the note and the acceptor of the bill are really indebted to the extent they profess to be by making and accepting. That is termed *accommodation* which is given where no debt is due, where such maker and acceptor make and accept the paper, when they are not indebted, and when the object is to enable the party to whom it is given to sustain his credit, or to raise money for the purposes of his business. The first kind is regarded as evidence of a debt in the hands of the payee; and is as available to him as to any subsequent party. The second is evidence of no debt in the hands of the payee, and only becomes negotiable paper in the hands of the party to whom he transfers it for value, and in accordance with the purpose for which it was given.

§ 283. The general rule is that parties who are legally competent to contract may become liable as parties to negotiable paper. There was formerly some difficulty as to the liability of corporations, but they are now regarded as competent in regard to all matters within the scope of their corporate powers. An apparent exception obtains in the case of married women, who, although competent in equity, under certain circumstances, to make contracts such as will bind them to performance and payment out of their separate property, are nevertheless not legally competent to bind themselves by becoming parties to negotiable paper. *Erwin v. Downs*, 15 *New York Rep.* 575.

## QUESTIONS.

What was the origin of negotiable paper? What the germ from which the different kinds proceeded? What is a bill of exchange? Who the different parties to it, commencing with the party drawing it? How may the drawee become the acceptor? What character does the acceptance give to him? How may the payee become indorser? Who the party to whom he delivers it indorsed? What is a promissory note? How is that placed on a footing with a bill of exchange? What is a promissory note in the hands of the payee analogous to? When and how does it become precisely analogous to a bill of exchange? What is a bank check? What the first conflict in the cases relating to it? What the second point of difference? What the points of difference between it and a bill of exchange? How many kinds of bills of exchange? How a bill drawn in one State payable in another? What two classes of parties to negotiable paper? What the difference between the two? What other division of negotiable paper? What constitutes the difference between the two? Who may legally be parties to negotiable paper? Can married women be such parties?

## PART II.

## REQUISITES OF NEGOTIABLE PAPER.

§ 284. Although no particular form of words is required to constitute a bill or note, yet there are certain essentials without which no instrument can be negotiable paper. There must be sufficient in it to make out an *order* or *promise* to pay, and hence a mere *acknowledgment* of a debt has not been deemed sufficient. But a promise to *deliver* or to be *accountable* or *responsible* for such a certain sum of money, has been held sufficient. It must be for the payment of money alone, but whether the promise to pay "*in bank bills*," divests it of the quality of negotiable paper or not, has been a question of much difficulty. In England it has that effect. In this country the decisions are both ways, although the leaning is rather in favor of the English rule. *McCormick v. Trotter*, 10 *Serg. & Rawle*, 94. *Fry v. Rousseau*, 3 *McLean*, 106. It must also be for the payment of a *sum certain*: thus a promise to pay £13, *and all*



*finis according to rule*, is no promissory note. *Ayrey v. Fearnside*, 4 M. & W. 168. The promise must be clogged by *no conditions or contingencies*. Nor must its payment depend on the *sufficiency of any fund* upon which it is drawn. Orders upon public functionaries, as upon the Postmaster General, are held not negotiable. *Reeside v. Know*, 2 Whart. 233. A bill or note must be a "courier without luggage," and must tell its story upon its face or back. It is designed to pledge only the personal credit of the parties to it.

§ 285. It must be for the payment of money *at all events*, and hence if there be any contingency as to its payment, it is no bill or note. But if made payable on the happening of an event, however remote, yet if it be of certain occurrence, the bill or note is good, as if made payable two months after the death of the maker's father.

§ 286. Conditions to destroy the character of a bill or note need not be on its face. An indorsement on the back of it rendering it payable upon certain conditions, and *done at the time of the making of it*, will have the same effect. But a contemporaneous *parol* agreement can have no such effect, because, resting in *parol*, it is not admissible in evidence, nor would an indorsement which simply referred to an agreement by way of identification.

§ 287. A bill or note must contain some *amount*, which it is usual to specify in figures on the lower left hand corner of the instrument as well as in writing in the body, and where there is a difference between them, it is the written words that control. A *date* is also usually inserted, although if omitted it dates from the day on which it was made. The term *month* means a calendar month, except in New York by statute, for the computation of interest it is lunar; and the times for payment are generally expressed to be *on demand*, *at sight*, a certain time *after sight*, or a certain time *after date*. If no time is specified, it is payable *on demand*.

§ 288. It is usual to insert the words *value received* in a

bill or note, but they are unnecessary. The contract embodied in negotiable paper is unlike other contracts in regard to the expression of a consideration. That element is introduced into other contracts, and forms a part of them, and must be alleged and proved in order to their enforcement. But in every negotiable bill, note, acceptance, and indorsement, the consideration is implied. There is always a presumption of value received, and hence the burden of proof rests on the other party to rebut it. This exception of presumed consideration, the law makes in favor of negotiable paper, in order to facilitate its transfer in the commercial world, by giving it the character of a safe security, in the hands through which it passes. These words are not usually inserted in checks.

### QUESTIONS.

What must be made out to constitute negotiable paper? Is promise to deliver, or be accountable or responsible, sufficient? What must it be for the payment of? How when it is a promise to pay in bank bills? What rule as to payment of sum certain? What as to conditions or contingencies? How when drawn upon particular fund? How with orders upon public functionaries? How must it be made payable? How if the event be of certain occurrence? How is it if conditions be upon its back, and when put there? How with contemporaneous parol agreement? How usual to specify amount? What the rule where words and figures differ? What the rule when date is omitted? What does term month mean? How are times of payment generally expressed? Are words "value received" necessary? Wherein does contract embodied in negotiable paper differ from other simple contracts? Why the exception in favor of negotiable paper?

### PART III.

#### TRANSFER OF NEGOTIABLE PAPER.

§ 289. It is in the facility by which all the rights of one party may be transferred to another, without being clogged with the defences to which it may be liable, that we find the great commercial value of negotiable paper. At com-

mon law a written contract cannot be transferred by the original contractor to another, so as to vest that other with a right of action in his own name against the other party to the contract. Such assignee was not, however, without remedy, as he might bring his action in the name of his assignor. But there was another difficulty, still more formidable, and constituting a heavier clog upon the transfer of this species of property. That was found in the fact that the assignee could only take it subject to all the equities and defences that existed against its enforcement while in the hands of the assignor. It was a courier clogged with luggage, and could not be relied upon as bearing its history upon its face. These two difficulties would effectually prevent the using of contracts as instruments of commerce.

§ 290. The *law merchant* steers clear of both these difficulties. A transfer by indorsement, or in some cases by delivery, of negotiable paper, enables the indorsee or holder to avail himself of all the remedies he may have upon it in his own name. This, therefore, is the first right which the *law merchant* gives to the holder of negotiable paper which is denied to the holder of other contracts.

§ 291. Another right, which is of still greater importance, is that if so transferred in the ordinary course of business, before it is due, to a person who takes it bona fide, for value, and without notice, he receives it free and clear of most of the defences which might have been available against it in the hands of the party from whom he received it.

§ 292. There is still another point of difference important to notice. At common law an ordinary contract is good only as between the immediate parties to it. On its assignment and transfer to another, the only immediate parties are the assignor and assignee, and hence the only right which the law gives to the assignee, and which he can prosecute in his own name, is against the assignor. In the case of negotiable paper, the *law merchant* gives to the

party to whom it is properly transferred, the same right to proceed against all the parties to the bill or note, provided all the necessary steps have been taken, as the common law in other contracts gives him against the immediate party from whom he received it. According to the law merchant, every prior party makes the same contract with every subsequent one, that he does with the party who immediately succeeds him.

§ 293. The condition upon which the law merchant confers these extraordinary privileges upon this species of contract is that it shall contain words that render it negotiable. These words are those of "*order*," and "*bearer*." A bill, note, or check, in order to be negotiable, must be made payable to the payee named therein "*or order*," or to the same payee, "*or bearer*." In the case first mentioned it can be transferred to another only by the indorsement of the payee, while in the second it may be so transferred merely by delivery.

§ 294. The essential elements embraced in an indorsement are time, place, party, mode, and effect. In regard to time, indorsements of bills are usually made after acceptance, and before payment. It is not until after acceptance, when the primary liability of the principal debtor is secured, that its marketable qualities become complete, and it is fitted to perform its perfect functions as a commercial agent. It is possible, however, for the indorsement to be made previous to the completion of the bill. This is done by placing the signature on a blank piece of paper, which operates as a letter of credit, and authorizes the person to whom it is confided to insert whatever sum he may choose, and to make it payable at whatever time and place he may think proper. The same general principle also applies to promissory notes. *Jordan v. Neilson*, 2 Wash. 164.

§ 295. A bill or note continues legally transferable by indorsement after it falls due and until its payment. But as there may be a material difference relating to the effect

of the indorsement, whether it was made before or after it fell due, it is important to notice that in the absence of all proof on either side, the indorsement is presumed to be made before it falls due; and hence if the defendant, in a suit brought by the indorsee, sets up payment to the original holder, he must show the indorsement to be made subsequent to the payment. *Pinkerton v. Bailey*, 8 Wend. 600.

§ 296. As the law of the *Lex loci* must control in the interpretation of the contract, it often becomes necessary to determine the *place of the indorsement*. The rule is understood to be that the contract embodied in the indorsement is governed by the laws of the country where it is made. The next question that occurs is, Where is the contract considered to be made? Is it where the name is actually written, or where the note, after being indorsed, is first negotiated? If the indorser, at the time he indorses it, transfers it for value to the indorsee, that is the place of the indorsement. But if it be an accommodation indorsement, it is then considered as being made at the place where the paper is first negotiated. Thus where such a note, although dated in Michigan, was first negotiated in the city of New York, it was held that the contract of indorsement was made in New York, and therefore must be governed by the laws of that State. *Cook v. Litchfield*, 5 Seld. 279.

§ 297. An indorser may pay a bill *as such*, and afterwards negotiate it, for his indorsement can give no right except against himself and those whom he himself might sue. If a bill be paid at maturity, the parties to it will be discharged, although, by accident, their names should be left on the bill, and it should subsequently be re-issued, and thus get again into circulation. But if paid before it arrives at maturity, and the person so paying it allows his name to remain on it, he runs the risk of being subsequently called upon by a *bona fide* holder to pay it. "Nothing," says Baron Parke, "will discharge the acceptor or the drawer, except payment *according to the law merchant*, that is, pay-

ment of the bill at *maturity*. If a party pays it before, he *purchases it*, and is in the same situation as if he had discharged it." *Morley v. Culverwell*, 7 M. & W. 174.

§ 298. Where a bill or note is payable "to order," the party who must indorse and put it into circulation is the payee, or person legally interested in the instrument, or his agent. It is only through this avenue that title can be transferred to the first indorsee, and hence if that fails to be properly done, neither he, nor any subsequent holder, has any remedy against the prior parties to the bill. It is entirely competent for the properly authorized agent of the payee so to indorse it as to transfer the title, but in such case he should expressly indorse it as agent, as A, agent for B, or in some way write the name of his principal; otherwise the indorsement would be inoperative. Thus, where negotiable paper is indorsed to or by a bank, its cashier is the proper officer or agent to effect the transfer by indorsement; and where a note was indorsed "A B cash," with the intention of binding the corporation, it was held sufficient for that purpose. *Bank of Genesee v. Patchin Bank*, 3 Kern. 309. And where it is known that the holder of a bill is entitled to it only as agent, no one having notice of such fact should take the same by indorsement from him without first ascertaining the extent of his authority. This is more especially the case, where by the very terms of the indorsement, as, "pay to A B, for my use," or "the within must be credited to A B," it is rendered sufficiently clear that the indorsee or holder is a mere agent.

§ 299. In case of the death of the payee, the right of transfer becomes vested in his personal representatives,—executors or administrators. These, however, should be careful to make the indorsement in their representative character, as it is not their title, but that of their testator or intestate, that they are to transfer. Where a note or bill is made payable to two executors, as such, it requires the in-

dorsement of both to transfer title to the indorsee. *Smith v. Whiting*, 9 *Mass.* 334.

§ 300. Where a note or bill is made payable to a partnership, it is competent for one partner to indorse and transfer it in the name of the firm, and thus to give a good title, even although it be done in fraud of the partnership. And if the indorsement be not in the name of the firm by one of the partners, it will nevertheless transfer title, and be binding on the partnership, if it be proved that there has been a habit of so indorsing their bills. *Faith v. Richmond*, 11 *Adol. & Ellis*, 339.

§ 301. Where the payees consist of several persons who are not partners, the right of transfer vests in all collectively, and not in any one individually, and hence all must indorse it.

§ 302. In case of the existence of a trusteeship, or where a bill or note is made payable to "A for the use of B," the right of transfer exists only in A, as he only has the legal title. And if a bill or note be given to a married woman, or if the unmarried holder of a bill or note marry, the right to transfer it during the coverture, or continuance of their joint lives, devolves by the common law upon the husband, the marriage relation merging her legal existence in his.

§ 303. As to the mode of indorsing, it is considered sufficient if the indorsement be written in pencil. There are two modes of indorsing, one of which is termed "indorsement in blank," and the other "indorsement in full." The first consists merely in writing the signature of the party on the back of the bill or note. This is the signature of the person to whose order the bill or note is made payable, and if the same be made payable to A, to the order of B, it is the latter who should indorse it for transfer.

§ 304. It has been made a question what is a sufficient indorsement in blank. In *Fenn v. Harrison*, 3 *T. R.* 757, the merely putting a *number* or any *private mark* on a bill was held not to be equivalent to an indorsement. In the

*Merchants Bank v. Spicer*, 6 *Wend.* 443, the mere initials of a person's name indorsed on a check were held sufficient. The extremest case on this point, and one that has been pronounced a very extraordinary decision, is that of *Brown v. The Butchers & Drovers Bank*, 6 *Hill*, 443, in which it was held that a party placing the figures "1, 2, 8," in lead-pencil, on the back of a bill by way of indorsement, was sufficient, although the party possessed the ability to write.

§ 305. The indorsement "in full," is a restrictive indorsement, and occurs where the paper is indorsed as made payable to the indorsee or his order, and then signed by the indorser, as "Pay James Flynn or order.

PETER DUNN."

The effect of the two thus differs. After the first indorsement in blank by the payee, or indorsee, if made payable to his order, it is transferable afterwards *ad infinitum* by mere delivery; but so long as the bill or note continues to be indorsed in full, it can only be transferred through the indorsement of the indorsee.

§ 306. As a blank indorsement is held to transfer the note or bill to all the subsequent indorsees in succession, discharged of all obligations which do not appear on its face, it follows that each indorsee or holder, being the absolute owner of the paper, may, if he chooses, protect himself against any thing but forgery, in case of loss, by writing an indorsement in full over the name of the last indorser; thus rendering his own indorsement necessary to transfer the title to another. A bona fide holder may thus convert a blank indorsement into one in full, either before or after the commencement of a suit. *Evans v. Gee*, 11 *Peters, S. C. Rep.* 80. He may, if he choose, entirely stop the currency of the bill by giving a bare authority to receive the money; such as "pay to A for my use," or to "to A B or order, for my use," or to "A B only," or for "my account." *Sigourney v. Lloyd*, 8 *B. & C.* 622. But although such



holder may restrict the negotiability of the paper, or even suspend it entirely by writing over the blank indorsement an assignment to himself, yet he has no authority to write over it a guaranty or any special contract; nothing but what the strict terms conceded by the law merchant to negotiable paper will permit. But although the payee has it in his power by a special indorsement, to restrain the negotiable quality of the bill or note, yet no subsequent indorsee can, by such an indorsement, do more than to protect himself and the parties subsequent to him, as the holder may, if he chooses, strike out all the indorsements, except that of the payee, and then recover against him and all the prior parties. *Smith v. Clark, Peake*, 225. The payee may also annex a *condition* to his transfer, and if it be done before acceptance, and the drawee afterwards accept it, the acceptance will be subject to the condition. A bill before acceptance may be indorsed for only a part of the sum for which it was drawn, and then if afterwards accepted, it is done so subject to such indorsement; but no indorsement, *after acceptance*, can be made for less than the full sum appearing due, because that would subject the acceptor to two actions, when by his acceptance he only rendered himself liable to one. *Douglass v. Wilkeson*, 6 *Wend.* 637.

§ 307. In regard to the effect of an indorsement, it performs two distinct and independent offices, the one to transfer the title to the indorsee, and the other to incur a conditional liability on the part of the indorser. It is in theory precisely analogous to a new bill drawn by the indorser upon the acceptor or maker. By simply indorsing and delivering to the indorsee, a contract is made with the latter, and every subsequent holder :

1. That the instrument itself and all the preceding signatures are genuine.

2. That his title to the bill or note he indorses is good.

3. That he is legally competent to bind himself by the bill or note as indorser.

4. That the acceptor or maker is competent to bind himself to the payment, and will, upon due presentment, pay it at maturity.

5. That if, when duly presented, it is not paid by the maker or acceptor, he will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder.

§ 308. No consideration need be shown to hold the indorser, nor can the want of consideration be set up as a defence where the holder has taken it *bona fide*, before due, and for value. And even where a note is indorsed for the accommodation of the maker, and therefore without any consideration, such indorser is liable to the indorsee, although all the facts were known to the latter when he took the note. *Brown v. Mott*, 7 *John*. 361.

§ 309. It makes a material difference, as to the effect of an indorsement, whether it was done before or after the bill or note was due. If before, the party receiving it takes it upon the credit of the paper alone, and is not bound to inquire into any equities or defences that may be interposed by prior parties. He is unaffected by them, and hence if the bill or note were fraudulently obtained or even stolen, it is no defence as against such bona fide holder for value received before it fell due. The necessities of commerce have given to such a holder rights thus perfect and complete. But if he receives it after due, the whole thing is then changed. It is then termed *disgraced*; there is presumptively some reason why it was not paid at maturity; the fact of its being overdue is, of itself, accounted such a suspicious circumstance, as makes it incumbent on the party receiving it to satisfy himself that it is a good one, and if he omit to do so, he takes it only on the credit of his indorser, and occupies precisely the position of the party holding it at the time it fell due. He receives it, therefore, subject to all objections relating to want of consideration, illegality, and all other possible objections and equities affecting

the instrument itself, and to which it was liable in the hands of the party from whom he takes it. But where it is negotiated in season, it may afterwards pass from one indorsee to another after it is due, and the holder will be, equally with the first indorsee, protected in his title. It follows as a consequence from this, that if a bill be presented for acceptance before it becomes due, which is refused, of which the holder neglects to give notice to the drawer and prior indorsers by which they are discharged; yet if before it falls due he transfers it to an innocent holder for value, who is ignorant of the laches, he can recover against such drawer and indorsers.

§ 310. It is, however, understood that when a party receives a bill or note overdue, he is clothed with all the advantages of the party from whom he receives it; and hence where a party sues the acceptor, it was held that if the person who indorsed the bill to him could himself have maintained an action upon it, the defendant could not set up in defence that it was given for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due. *Chalmers v. Lanion*, 1 *Camp.* 383.

§ 311. As regards the equities and defences with which a party receiving it after due is chargeable with notice, it is limited to such as arise out of the bill or note transaction itself; and hence, where in a note negotiated after due, the maker sets up a claim of set-off due to him from the indorser while he held it, and claiming, that although arising out of a matter collateral to the note, it was yet admissible as a defence against the holder, it was held inadmissible. *Burrough v. Moss*, 10 *B. & C.* 558. This is the rule in force in Pennsylvania. *Hughes v. Laye*, 2 *Barr*, 103. Also in Connecticut and New Hampshire. But in New York, by a provision in the Revised Statutes, and in Massachusetts, by subsequent adjudication, the right of set-off has been greatly enlarged.

§ 312. The importance of the fact as to whether a note

is overdue or not at the time of its transfer has led to the inquiry when a note payable *on demand* is to be considered as due; and the rule is, that the transfer of such note is not to have attached to it the consequences of a note overdue without some proof that payment has been demanded and refused, or that a considerable time has elapsed since its execution and delivery. The rule laid down by C. J. Shaw in *Sylvester v. Crapo*, 15 *Pick.* 92-3, is that a note payable on demand is payable within a reasonable time; that after the lapse of such reasonable time it is to be deemed overdue and dishonored, and that what is a reasonable time is a question of law on the facts proven. The burden of proof in such cases lies on the defendant.

§ 313. It must not, however, be assumed as true that a party can, under all circumstances, receive a note or bill *before it falls due*, and yet remain unaffected by any defences that may be set up against it. The rule is, that if the bill or note is taken under such circumstances as would naturally excite suspicion, and induce any reasonable man to inquire fully into such equities or legal defences, it admits the defence to be set up, as where an accommodation note was made to be discounted at a bank, and the maker having failed to get it so discounted, not being a lottery dealer, took it with the bank marks upon it to a lottery dealer, and sold it for lottery tickets, it was held in favor of the accommodation indorser that the occupation of the maker and the bank marks upon the note were sufficient to put him on inquiry, and hence that he took it subject to the defence of misapplication. *Brown v. Taber*, 5 *Wend.* 566.

§ 314. The two functions performed by the indorsement, the one of transfer and the other of incurring liability, may, so far as the first is concerned, be separated from the other, and exist without it. Thus an infant may indorse a bill or note so as to transfer title, but incurs thereby no liability, while the right of the holder remains perfect against all the other parties. So, also, there may be a qualified indorse-

ment, which transfers the title without creating any liability. This is done by inserting in the indorsement itself "at his own risk," or "without recourse." The effect of such an indorsement is to transfer the title so completely as to give the transferee a perfect right as against all the other parties to the paper, while the indorser remains exempt from liability by the terms of his special contract.

§ 315. A question has arisen as to the effect of an indorsement after a note becomes due ; whether such indorsement follows the nature of the original contract, or becomes, as between indorser and indorsee, a new draft on the maker for the money in his hands, and is thus, in all respects, a new contract, which may be made negotiable or otherwise, as the parties may choose. Thus Messrs. J. W. & R. Leavitt made their note for \$1570.52 payable to the order of "T. Putnam & Co.," the defendants. A few days after its maturity the defendants thus indorsed it : "Pay the within to A. Thacher, value received, May 21, 1848. T. Putnam & Co." Thacher indorsed without recourse to the plaintiff. It was held that the indorsement of a negotiable note is negotiable without words of negotiability, so that a subsequent holder may sue in his own name, either upon the note or indorsement. That such indorsement, although made after dishonor, follows the nature of the original contract, and is negotiable unless it contain express words of restriction. *Leavitt v. Putnam*, 3 Comst. 494.

§ 316. A bill or note payable "to bearer," is transferable by mere delivery without indorsement ; yet if it be indorsed, the indorser is liable as upon a new bill to bearer. *Brush v. Reeves*, 3 John. 439. An indorsement continues revocable until delivery to the indorsee ; hence the delivery is as essential as the indorsement to pass the title, and in a case where a person deceased had written his name upon a bill payable to order, and after his death the executor delivered the bill to the plaintiff, held that no title was acquired ; so that indorsement of a bill payable to order,

without delivery, or delivery without indorsement, is insufficient to pass the legal title. *Clark v. Sigourney*, 17 Conn. 511.

§ 317. A question of great interest and importance has arisen and been differently decided, regarding the effect of the note or bill of a third person indorsed and delivered over by a debtor to his creditor on account of his debt—whether, and under what circumstances, such a transfer will extinguish the debt, and if not, what effect is attributable to it. In the United States Courts, and in those of several of the States, the doctrine is well settled, that such a note does not extinguish the precedent debt, unless it be paid at maturity, or unless it be so expressly agreed at the time it is received. But in some of the States, as Massachusetts, Maine, Vermont, such transfer is *prima facie* to be received as payment. In cases where it does not operate as payment, it suspends the remedy upon the debt until the bill or note falls due; and then the holder cannot proceed against the original debtor for the recovery of his debt without showing that he has used due diligence to obtain payment from the party to the bill or note, and if the defendant was also a party he must show that he had due notice of the dishonor. And if he fails to take the requisite steps (hereafter mentioned) to fix the liability of the parties on the paper, so that his debtor loses his remedies against them, he will also lose all remedy against the debtor on his debt. In regard to its operating as payment, it is now held to be matter of *presumption*, and in the State of New York where the bill or note is received on a precedent debt, the presumption is that it was *not taken* in payment, and the *onus* of establishing that it was agreed to be so taken is upon the debtor. But where it is received contemporaneously with the contracting of the debt, the presumption is that it was agreed to be taken in payment, and the burden of proving the contrary rests on the creditor. *Noel v. Murray*, 3 Kern. 167.

§ 318. Another question, depending very much upon the

manner in which the last is settled, relates to the effect of such a transfer in creating the creditor *such a bona fide holder for value* as, if he took the same before due, would enable him to resist successfully any equities or defences that may be interposed in defence. If the effect of the transfer do not operate as a payment or extinguishment of the debt, then there is no sufficient consideration, and he cannot occupy the position of such a *bona fide* holder, but if it be received in satisfaction and discharge of the debt, there is then such a valuable consideration as will constitute him such a holder. Thus when a note for the maker's accommodation is transferred by him before maturity to a judgment creditor as security for the judgment in consideration of the discontinuance of proceedings supplementary to execution, it was held a valuable consideration. *Boyd v. Cummings*, 17 *N. York Rep.* 101.

The doctrine that requires the note to be received in satisfaction of the debt in order to constitute a *bona fide* holder, and to protect him against prior equities, is not entirely acquiesced in, as there is authority to the effect that a mere transfer of the note as collateral security upon a pre-existing debt, and with any other consideration, will have the like effect. *See Tyson*, 16 *Peters*, 1. But this position is completely overruled in the State of New York by two cases decided by the highest court. *Coddington v. Bay*, 20 *John.* 637. *Stalker v. McDonald*, 6 *Hill*, 93.

§ 319. The act of indorsing is so very similar to that of drawing a bill that it is after it all its legitimate consequences, and it has been held that an indorser stands in all respects in the same situation as a drawer, and that all the consequences follow which attached to the situation of the latter. *Ballingalls v. Gloster*, 3 *East.* 483. The contract of the one is so similar to that of the other, that the indorser is said to be the drawer of a new bill, and in a case in which the indorser pleaded that *he did not draw the bill*, it was held good in substance, the indorsee being, in contem-

plation of law regarded as a new drawer. *Allen v. Walker*, 2 M. & W. 317.

§ 320. The indorsement itself is always regarded as evidence of an undertaking to pay money upon a consideration received by the indorser. *The Cayuga County Bank v. Warden*, 2 Seld. 19. The effect of the indorsement is always to create a valid contract between the indorser and his immediate indorsee, and hence in an action by the *bona fide* assignee of a promissory note against the assignor, it is held no defence that the note was originally given by the maker to the defendant for an illegal consideration, the assignment of the note being itself a contract which *prima facie* imports a good consideration. *Johnson v. Dickson*, 1 Blacks. 256.

§ 321. The effect of the mere delivery of a bill or note without indorsement is not to exempt the party from all obligations or responsibilities, unless by special agreement to the contrary. The party so delivering incurs the following:

1. He warrants by implication that he is a lawful holder and has a good title to the instrument, and a right to transfer it by delivery.

2. He warrants the genuineness of the instrument, that it is neither forged nor fictitious.

3. He warrants, in like manner, that he has no knowledge of any facts, which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid or otherwise to have become void.

#### QUESTION.

What two difficulties prevent the using of contracts as instruments of commerce? What the difference in this respect between contracts and negotiable paper? What the difference in regard to equities or defences that may be set up? What the difference in relation to parties to the contract? What is the condition upon which the law confers extraordinary privileges upon negotiable paper? What are words of negotiability? What the difference between being payable "to order" and "to bearer"? What are the essential elements embraced in



the indorsement? When are indorsements usually made? When do the marketable qualities of negotiable paper become complete? At what early period can an indorsement be made? How is it then made? How does it then operate and what does it authorize? How long does negotiable paper continue transferable by indorsement? When is the indorsement presumed to be made? When is the contract of indorsement considered to be made? Can an indorsee, after paying, again indorse and negotiate? What is the difference between payment before and at maturity? Who is the necessary party to indorse a bill or note payable to order? Through what avenue is title transferred to the indorsee? How should an agent indorse? In case of death of payee who should indorse? How should they indorse? Where paper is made payable to two executors as such, how should it be indorsed? How when payable to a partnership? When good, if in the name of one of the partners? How to be made if payable to several persons not partners? How in case of trusteeship? How if payable to A for the use of B? How if given to a married woman? How may a signature be written to be good? What two modes are there of indorsing, and what called? What does the first consist in? What is a sufficient indorsement in blank? What is an indorsement in full? What is the difference between the two indorsements? What are the rights of the holder, and how may he protect himself? What is the limitation as to what he may write over the name of the indorser? Who alone can restrain the negotiable quality of the bill or note? What may subsequent indorsee do? What is the right of the holder? May a payee annex conditions and with what effect? May a bill be indorsed for a part of the sum for which it was drawn? Any difference in regard to that whether done before or after acceptance, and if any what? What two offices are performed by indorsing? What is it analogous to in theory? What does the indorser contract to do by indorsing and delivery to indorsee? And with whom is his contract made? Is any consideration necessary to hold indorser? Where cannot want of consideration be set up? Any difference in effect of indorsement whether done before or after bill or note fell due? How if before? How if after? Suppose it first negotiated in season, how then? What follows by way of illustration? With what advantages is a party clothed who receives bill or note after due? What the rule of limitation relating to equities and defences as to party receiving it after due? When is a bill or note payable on demand considered as due? May negotiable paper be received before due, and yet subject holder to equities and defences? Under what circumstances may it be so received? What instance in illustration? Can a bill or note be indorsed to transfer title without incurring liability? How in

case of infant? How by a qualified indorsement? What the effect of indorsement after note becomes due? How is indorsement of negotiable note held? How is paper payable to bearer transferable? How if it be indorsed? How long does an indorsement continue revocable? What is essential to pass title? What instance in illustration? What effect has paper of a third person transferred on account of debt? When does it extinguish the debt? What effect when it does not operate as payment? What then must holder do before he can proceed against debtor to recover his debt? What results if he fail to take steps to fix liability of parties on the paper? What is now the presumption where the debt is antecedent? What, where it is contemporaneous? In case of such transfer on account of debt when is the creditor regarded as a *bona fide* holder for value? When not so regarded? What consequences follow indorsing analogous to drawing bill? What is indorser said to be? How is indorsement always regarded? What is the effect of the indorsement? How regarded as between the immediate parties? What are the obligations or responsibilities incurred by simple delivery unindorsed?

#### PART IV.

##### DUTIES OF THE HOLDER IN PRESENTING FOR ACCEPTANCE, AND THE ACCEPTANCE.

§ 322. This part is confined in its subject-matter to bills of exchange. Even checks, as such, are not presentable for acceptance as distinct from payment, although the practice, which is adopted in some banks, of certifying to the goodness of checks is, in effect, analogous to an acceptance. The holder, who may be either the payee, or indorsee, or some party who holds it simply by delivery, is desirous of knowing what step he is next required to take. The instrument he holds has as yet on it only contingent liabilities. The drawer has drawn it presumptively upon funds of his in the hands of the drawee, to whom he has directed it. By drawing and delivering it, he is understood to contract with the payee, and every subsequent holder, that the drawee will upon presentment and demand, accept and pay the bill according to its tenor, and that if he fail to do so, and the holder gives him the notice to that effect, required by the

law-merchant, he will then pay the bill himself. Each indorser enters into substantially the same contract. It is all wholly contingent, and the obtaining an absolute liability by procuring the acceptance of the drawee, or, in case of his refusal, the conversion of the contingent liabilities of drawer and indorsers into absolute liabilities, is to be the work of the holder. Before that is done, it may be, and is, a commercial agent, and by passing from hand to hand may purchase half the goods in a commercial metropolis; yet it is all upon the faith and confidence that the drawee, when applied to, will accept and pay; or if not, that the drawer and indorsers, or some one of them, will take it up upon receiving notice.

§ 323. The first inquiry he would be likely to make, would be to discriminate, and to learn in what cases an acceptance *must* be applied for, and either obtained or refused, and in what it *may* or *may not*, at his election. Where he is the holder of bills payable so many days or months "after sight" or "after demand," there the only mode of determining the time of payment, is to present for acceptance. But those are the only cases in which such presentment is necessary. In bills payable so many days or months after date, or at such a period of time in advance, it is not necessary to present for acceptance. The only thing necessary in such case is to wait the arrival of the time specified, and then present and demand payment. But in all such cases, the holder may, at any time, present and demand acceptance; and as the market value of the bill is increased by having on it the absolute, primary liability of the acceptor, in most cases he will take the steps necessary to procure that liability. Should the holder stand in the position of an agent, he should lose no time in presenting for acceptance; because if during his delay the affairs of the drawer should become deranged, he might be answerable in damages to his principal.

§ 324. A question here presents itself of great practical

importance ; and that is, where a bill is payable so many days or months after sight or after demand, how long is he at liberty to keep it before presenting it for acceptance—at what point of time, should he fail to procure the acceptance, would he lose his remedy against the drawer and prior indorsers. Some difference, as to time, prevails here with different kinds of bills. Foreign bills of exchange may be kept longer in circulation than inland. But they should be kept in circulation, as they cannot be locked up for any considerable period of time without hazard. *Millish v. Rawdon*, 2 *Moore & S.* 570. As to inland bills, a shorter period is allowed ; but as to neither can any absolute rule be laid down. The only rule is that the bill must be presented for acceptance within a reasonable time ; but what that reasonable time is, must depend much upon the circumstances of each particular case. A different view is taken of this question, or rather of the manner of solving it, in England and in the State of New York. In the former, it is regarded as a question of fact, to be determined by the jury, under the direction of the court. In the latter, as one of law, to be decided by the court. *Aymar v. Beers*, 7 *Cow.* 705. With us, *reasonableness of time*, where the facts are not in dispute, is always and properly regarded as a question of law.

§ 325. The elements of *person*, *time*, and *place*, enter into the presentation for acceptance. The person presenting should be the rightful holder. But as possession is *prima facie* evidence of title, and, presumptively, has been rightly attained, the drawee, though he accept a bill presented by a person having no title to it, is not precluded from subsequently disputing the genuineness of the successive indorsements. Where a firm are drawees, a presentation to one member is sufficient ; but where two or more, not partners, are drawees, it must be presented to each, as one has no right to bind the others by an acceptance. As to *time*, when the presentation is at a bank, it should be within the

usual banking hours; but in other cases, it may be done during the usual hours of business, which includes the day and evening. In reference to *place*, it should be presented at the residence or domicile of the drawee, without any reference to the place where it is drawn payable; but if a place is specified on its face, it should be presented at such place.

§ 326. On presentment for acceptance to the drawee, he, before accepting, should satisfy himself of two things, 1. That the handwriting of the drawer is not a forgery, as his acceptance precludes him from denying the genuineness of the drawer's signature. 2. That he has funds of the drawer in his hands to an amount equal to the sum contained in the bill; and he is allowed time, if desired, to investigate the state of the accounts with the view of determining this question. If he have such funds, and they are immediately payable, he is under no legal obligation to accept the bill. No action lies against him for a refusal, unless he has received the funds for the purpose, or under a promise thus to accept. If an agent be to accept, he should exhibit to the holder his authority, and it is for the latter to determine its sufficiency. One partner may accept in the name of the firm, or even an acceptance in his own name is sufficient, provided the bill is drawn on the firm. If drawn on two or more, not partners, it must be accepted by each.

§ 327. A great question has been much discussed, both in England and in this country, as to whether a *promise to accept* is to be considered as *equivalent to an acceptance*. To the production of such a result here the following circumstances must concur:—

1. The paper containing the promise must describe the bill to be drawn in terms not to be mistaken, so as to identify and distinguish it from all others.

2. The bill should be drawn within a reasonable time afterwards, and be received by the person taking it upon the faith of the promised acceptance. *Coolidge v. Payson*, 2 *Wheat.* 66. The rule is applicable only to bills payable

on demand, or at a fixed time after date, and in no case is a *verbal* promise sufficient.

§ 328. The law-merchant prescribes no particular form in which the acceptance shall be made. It holds expressions indicating an intention to pay the bill when due, sufficient. Every act giving credit to the bill amounts to an acceptance. It may be done by parol, or in writing. It may be revoked at any time before it is communicated to the holder, or the accepted bill delivered to him. The acceptance may be inferred from the act of the drawee in retaining the bill long in his possession. In New York and some other States, the mode is regulated by statute, 3 *R. S.* 68, 5 *Ed.* It must be in writing and signed by himself or his agent. But it shall be deemed accepted if the drawee destroy the bill, or refuse to return it.

§ 329. The right of the holder is to have an absolute acceptance, which is an engagement to pay the bill according to its tenor. If this is declined, and any other is offered, he may refuse to receive it, and protest the bill for non-acceptance. But the drawee being at liberty to accept or not, is also free to offer any kind of acceptance. He may offer to accept for a part only of the bill, or the whole, subject to some condition; the most usual one, the receipt of funds from the drawer. He may, however, propose any variation from the tenor of the bill, as to *sum, time, place, or mode* of payment. Upon receiving such an offer, the safe course for the holder to pursue, is to give immediate notice to the drawer and indorsers of the kind of acceptance offered, and await their direction whether he shall receive it or not. He has no right, without their consent, to vary their contract, which is that the acceptance shall be according to its tenor; and yet all parties may be interested in having the acceptance offered, received.

§ 330. Whatever qualification is introduced into the acceptance, if received, it affects every party to the bill alike, so that the holder's remedy against drawer and in-

dorsers is subjected to the contract embodied in the acceptance. In case of a conditional acceptance, the holder, in order to recover against the acceptor, or against the drawer or indorsers, must show performance of the condition. If the acceptance be in writing, the condition, whatever it may be, must also be in writing, or it will avail nothing to the acceptor. If, however, the acceptance be verbal, as the law-merchant permits, wherever it prevails, it is competent to introduce any verbal condition, as that he will pay the bill when in funds. *Mendizibal v. Machado*, 3 *Moore & Scott*, 841.

§ 331. A question has been raised in the States of New York and Massachusetts, as to the effect of an anticipated acceptance on a forwarder's receipt pledged with the party discounting the bill on the strength of such receipt. An owner of flour in Rochester draws on his general consignee in Albany, and taking the draft and receipt pinned to it (the latter being pledged for the former) to a bank in Rochester, obtains the money by discount. The Rochester Bank transmits both to their collecting agent in Albany, who presents them to the drawee, to whom the drawer was largely indebted for previous advances. The drawee retains the receipt, disposes of the flour, applies the proceeds on his previous advances, and refuses to accept the bill. The point was to whom the flour belonged, and it was held to belong to the Rochester Bank. *The Bank of Rochester v. Jones*, 4 *Comst.* 497, overruling decision of the Supreme Court in 4 *Denio* 489; see also *Allen v. Williams*, 12 *Pick.* 297.

§ 332. The drawee, by accepting, transforms himself into the principal debtor, and precludes himself from setting up in defence, as against an innocent *bona fide* holder who had received the same in the ordinary course of business, and before due for value, either that he was an accommodation acceptor, or one without consideration; or, that the sum inserted therein is different from that inserted by the drawer; or, that the signature of the drawer was forged. He

is at liberty, however, to deny the signature of the indorser, even though the drawer and indorser be the same person ; and, as against the drawer, may set up that it was an accommodation acceptance. As such principal debtor, he can only be discharged by the bar of the statute of limitations, or by payment, or a release ; and the two latter are no defence as against an innocent *bona fide* holder who had taken the same for value before it fell due.

§ 333. After a general acceptance by the drawee, there can be no other acceptor. But in case of a declined acceptance, or an offer of conditional acceptance not received, any friend of the drawer or of any of the indorsers, may offer his acceptance, *for the honor* of his friend, which is termed an acceptance *Supra Protest*. It is so termed because it is only done *after the Protest*, and the object of it is to save the credit of the bill, and to prevent the parties upon it from being immediately sued. It presents an instance where the *law-merchant* allows what the *common law* does not, viz. : that a stranger may voluntarily constitute himself the creditor of another. This species of acceptance may be for the honor of the drawer, or of any one of the indorsers, and if there is no specification for whom it is made, it is considered as made for the drawer. An acceptance for the honor of one of the parties to it may be followed by a similar acceptance for another or others. The holder is not obliged to receive this kind of acceptance, but may, if he chooses, seek his immediate remedy upon the bill. If, however, he receives it, he must treat the bill as accepted, giving the credit it requires. This acceptance is done by writing under the protest "accepted Supra Protest" or "accepts S. P. for the honor of ——" . This is really an accommodation acceptance, and such an acceptor should give immediate notice to the party for whose honor he accepts, that he has so accepted. The effect of it is, that it is a conditional undertaking, and amounts to a positive engagement to pay the bill at its maturity, provided the drawee on application to him



for that purpose declines. This devolves upon the holder the necessity, when the bill becomes due, of presenting it again to the drawee and demanding payment; of protesting the same for non-payment, and of giving due notice to the acceptor *Supra Protest*. Such an acceptor becomes liable as a principal debtor to all the parties to the bill who are subsequent to the one for whose honor he accepted; and if he has given the proper notice to such party, he can look for his indemnity to him and to all the prior parties who are liable to him.

### QUESTIONS.

What contract and with whom does the drawer make by drawing and delivering the bill? Who is to convert contingent into absolute liabilities, and how? What is the bill previous to this conversion? What may it do, and upon what faith and confidence? In what cases must the acceptance be applied for and obtained or refused? In what cases is this optional with the holder? What is the duty of the holder if he stands in the position of agent? What is the rule as to presentment where bills are payable so many days or months after sight or demand? What may create a difference as to time in such cases? What is reasonableness of time a question of? What elements enter into the presentation for acceptance? Who should be the person to present? Suppose the person presenting has no title? To whom presented, where a firm are the drawees? To whom, where two or more drawees are not partners? At what time should presentation be made? At what place? Of what should the drawee satisfy himself before acceptance? Is he under any legal obligation to accept? What, suppose an agent be to accept? A partner? Two or more, not partners? When, and under what circumstances, is a promise to accept equivalent to an acceptance? To what kind of bills is the rule applicable? What does the law-merchant prescribe in regard to acceptance? And what amounts to an acceptance under it? What are the provisions of the statute? What is the right of the holder in regard to acceptance? Suppose a conditional acceptance is offered? What may the holder do? What should he do to be safe? Whom does a qualified acceptance affect? How the remedies against drawer and indorsers? What must holder show in case of conditional acceptance? If acceptance be in writing, how must condition be? How if it be verbal? What effect is given to forwarder's receipt, pledged on a discount of a bill? What case in illustration? What does drawee do by accepting? What defences preclude himself from setting up and against

whom? What defences are available to him? How can he be discharged? When are payment and release no defence? What is an acceptance *for honor*, or *Supra Protest*? Why so called? What is the object of it? What instance does it present of variation of law-merchant from common law? Who may it be for the honor of? If no specification, for whose honor is it? Can there be more than one acceptance of this kind? Is the holder obliged to receive it? How, if he receives it? How is this acceptance done? What is it and what should the acceptor do? What is the effect of it? What does it devolve upon the holder? To whom does such an acceptor become liable, and to whom may he look for indemnity?

## PART V.

### DUTIES OF THE HOLDER IN PRESENTING FOR PAYMENT, AND PAYMENT.

§. 334. The holder having obtained the acceptance of the drawee, either absolute or conditional, or, in case of his refusal, that of some other, *Supra Protest*, has no other duties in reference to it devolving upon him until the bill falls due. Then he comes under obligations to present it *for payment*; and the doctrine here again becomes applicable to promissory notes and checks equally as to bills, the difference being, that in the case of the former, the demand must be upon the maker, and in the latter, upon a bank or banker, in the place of the acceptor. The same steps to be taken in each case.

§ 335. The first question that naturally arises relates to the duty of the holder, in order to preserve his remedy against the maker or acceptor, where the note or bill is made payable at a particular place. Does such stipulation form such a part of the contract, as to require the holder to comply with it or lose all remedy against the maker or acceptor? This is the English doctrine as settled in the House of Lords. *Rowe v. Young*, 2 *Bligh*, 391. Also in 2 *Brod. & Bing*. 164. But in this country generally, see *Wallace v. McConnell*, 13 *Peters*, 136, the rule is now understood to be, that, under such circumstances, a neglect to demand payment destroys no right to proceed against maker or acceptor; but if such

maker or acceptor had provided funds at such place to pay the note or bill, and it was not presented, he would be exonerated from the payment of all interest and cost ; and in case of the loss of such funds by the failure of the bank where they were deposited to await the presentation of the note or draft, then such maker or acceptor would be exonerated from liability.

§ 336. As the failure to make the demand of payment does not impair the right as against the principal debtor, it follows that the only necessity that requires it, grows out of relations existing between drawer and indorsers and the holder. Their undertaking to pay is only contingent upon the failure to do so of the maker or acceptor, and hence that failure together with the proper notice of it, must, by the holder, be made clearly to appear. In determining this question, the elements of *time*, *place*, and *person* are the most important for consideration.

§ 337. The time for making the demand is the day on which the note or bill falls due. This depends upon the method of computing time, and the allowance of days of grace. When the paper falls due a certain fixed period of time after date, the day of the date is excluded from the calculation. Where the term "*months*" is made use of, it is the calender, and not the lunar, month ; although in the computation of interest, a month means one twelfth part of a year. Days of grace are certain days, three in number, added to the time at which the paper would otherwise fall due. These, by the law-merchant, are added in all cases where the paper falls due at a certain fixed period of time. In all such cases the paper is really payable on the third day after, the day on which it would otherwise fall due being excluded. Thus if made payable on the first of the month, it is not demandable until the fourth of the month. These days are considered as forming a part of the original contract, and a bill or note transferred at any time before the third day of grace is treated as negotiated before due.

These days are not allowable on paper payable on demand, or, where no time of payment is expressed, or, where it is payable immediately on presentment. The law-merchant allows them where bills are payable at sight. In some States, as in that of New York, legislation has interfered, and taken them away on all bills or drafts payable at sight, and on all checks, bills or drafts drawn upon any bank or banker, although payable at a certain specified time after date or sight. If the third day of grace fall upon Sunday, or a great national holiday, the law-merchant makes the paper payable the day next preceding.

§ 338. On the last day of grace, where these are allowable, and if not, on the day when the note or bill by its terms falls due, the payment must be demanded. A demand made the day previous or subsequent, and not on the very day when it is payable, destroys all remedy against drawer and indorsers. The general rule is to allow the maker or acceptor the whole of the day on which the paper is payable to make the payment, and hence a suit brought on that day is premature. As commercial paper is mostly made payable at banks, the course is to consider the day closed at the close of banking hours, and immediately after to hand it over to the notary to protest for non-payment.

§ 339. The element of *place* is one of great importance. If no place is designated in the bill or note, the holder must look up the maker or acceptor, and on the day it falls due, demand of him the payment at his residence or place of business. If the maker or acceptor has absconded, that will excuse the demand. If he has removed from the State since the making of the paper, the demand should be made at his former place of residence. If he has removed, but not without the State, the holder should use all reasonable diligence to ascertain where his residence is and there make the demand. Where the bill is addressed to the drawee at a particular place and accepted generally, the demand should be

made at the place to which it is directed. This is usually a question of diligence on the part of the holder. Where it is made payable at a particular place, as occurs with most commercial paper, all that is necessary is to have it at that place on the day it falls due, and ready to be given up on payment. No formal demand is necessary. And this, although in this country unnecessary to hold the maker or acceptor, is nevertheless indispensable to hold the drawer and indorsers. When a note or bill is made payable in a particular city in which the maker or acceptor does not reside, and specifies no place of payment, it may be treated as dishonored without any inquiries, as they must necessarily be useless.

§ 340. In case of the loss of a bill or note, the demand is done by presenting a copy or written statement of the substance of the lost instrument, at the same time making proof of its loss, and tendering to the maker or acceptor an ample indemnity against any claim or demand that might ever after be made against him for or by reason of the instrument.

§ 341. There is one contingency in which, so far as concerns the drawer, there is no necessity of making any presentation or demand, either for acceptance or payment, or giving to him any notice in case of refusal to accept or pay; and that is where such drawer not only had no funds in the hands of the drawee to meet the draft, but had also no reason to suppose it would be either accepted or paid. But although a neglect here may be practiced by the holder without losing his remedy on the drawer, yet this does not embrace the indorser. He is not affected by any such conduct on the part of the drawer as precludes him from taking the benefit of the apparent laches of the holder. If the maker or acceptor are notoriously insolvent, that will not excuse the demand. Even in case of the acceptance *Supra Protest*, the demand of payment on the day the bill falls due must be made of the drawee, precisely the same as if

he had become the acceptor, because by that time he may be in funds to pay it, and the acceptor *Supra Protest*, only undertakes to pay in case of his refusal.

§ 342. The third element relates to the person by whom and of whom the demand of payment must be made. The person demanding should be the holder or his agent. No one is competent to make this demand who is not also legally competent to protest and give notice sufficient to hold drawer and indorsers in case of refusal. No mere stranger is competent to do this. But any one receiving it by a blank indorsement; or who has a mere verbal authority, if in possession of the paper; or if it has come into his hands by accident, as by the death of an agent; is entirely competent for all these purposes. The important feature is the possession of the paper. In case of the death of the holder, it devolves upon his personal, representative; in case of an assignment, to the assignee; in case of a trusteeship, to the trustee; and in case of an insane person, to his committee.

§ 343. If maker or acceptor be a firm, demand may be made of one of the members, and in case of the death of one, then of the survivor; if there are several makers or acceptors, not partners, demand must be made of each; and in case of death, of the personal representatives.

§ 344. The presentation and demand of payment being made of maker or acceptor, either one of them, before complying, should be satisfied of two things.

1. That his own, as also the signature of the first indorser, if bill or note be in the hands of a subsequent party, is genuine.

2. That the person demanding is entitled to receive it. In one respect, it is true both these amount to the same thing; because if the signature of the first indorser is forged, the only legitimate source of title is destroyed, and the person demanding it cannot be entitled to receive it. The indorser before paying should be further satisfied that there

has been no laches on the part of the holder or any other party ; because if drawer and indorsers have been thereby discharged, his unnecessary payment of it will not revive the liability of the prior parties, and thus his remedy over will be destroyed. In regard to the person to whom the payment is to be made, that is settled by the right to demand. In cases free from suspicion, the mere production of the note or bill indorsed in blank by the proper person, if payable to order, is sufficient to warrant the payment. But that production in all cases of negotiable paper should be required before payment, except where there is proof of loss or destruction.

§ 345. The payment must be made in money, and an authority to another to receive payment generally, will not authorize the taking of goods in payment. Even a check is regarded rather as a means of procuring the money than as absolute payment. But if produced by the debtor, having been drawn by him and indorsed by the creditor, it is held to be evidence of payment. *Egg v. Barnet*, 3 *Esp.* 196.

§ 346. An important inquiry may arise in this connection regarding the kind of acts on the part of the holder that will affect his remedies against the indorser. This involves the inquiry how far a holder may go in making new arrangements with the principal debtor without prejudicing his rights against the indorser. The maker or acceptor often desires, by giving some fresh security, or by some other means, to get some indulgence as to the time of payment, and the question important for the holder to settle is, how far he can yield to the wishes of the principal debtor without prejudicing or destroying his right against the drawer or indorser. The general principle is that he may do whatever may tend to favor the indorser without impairing any of his rights. Thus he may receive part payments and any additional security that may be offered. He may stand where he is and take his own time to proceed against the maker or acceptor, and if the indorser is apprehensive

of his failure, and thus of losing by delay, his remedy lies in taking up the paper himself, and then of proceeding to collect it against the principal debtor. The holder may even go further, and agree *not to press* the acceptor. He may even promise, if there is no consideration to sustain it, not to take any steps to enforce the collection—and all this without impairing any right against the indorser. But he cannot make a binding contract with such maker or acceptor, by which, for an adequate consideration, he precludes himself, even for a day, from proceeding against him, without destroying all remedy he may otherwise have against drawer and indorsers. Any valid agreement by which such drawer and indorsers are effectually shut out from taking up the bill or note at any time, and of proceeding immediately against the acceptor or maker, discharges them at once from all liability. And this agreement may be made at any time either before the maturity of the paper, or after its dishonor. But all the elements of a contract must be fully established, as the mere change or addition of securities, or the accepting a collateral security from the acceptor or maker, without the agreement as its consideration, will have no such effect. And the entering into a valid agreement with a *subsequent* indorser to give him additional time for payment, will not discharge a *prior* indorser, or *prior* party to the paper, because such party can never look to the subsequent one for payment; and hence any indulgence given to the latter, even if he be totally released, cannot in the slightest degree affect the rights of the former. So a holder may enter into any composition with the drawer of a bill, provided he gives up no securities, without releasing the acceptor. There is one mode by which the holder can safely contract to give time to the maker or acceptor, and that is by an express reservation in such contract of all the rights of all the other parties to the note or bill.

§ 347. When a party to a bill or note pays it up, he



should be careful to do one of two things, viz.: either have the instrument delivered up to him to be cancelled, or have his payment or satisfaction indorsed upon it. Otherwise he runs the risk of being compelled to pay it to some one who was a holder before it became due. *Woodroffe v. Hayne*, 1 *Car. & P.* 600.

§ 348. Another question of difficulty has presented itself in determining under what circumstances payments made under a mistake, where there has been a forgery, may be recovered back. As the drawee and acceptor are bound to know the handwriting of the drawer, there has been no difficulty in denying the right of either to recover money paid under any such circumstances of such drawer; but the question has arisen, and the difficulty presented, as between such drawee or acceptor and an innocent holder who had taken it for value before due, and in the ordinary course of business. The cases in England have seemed inclined to be governed by the time at which the discovery of the forgery and the demand of the repayment were made; allowing a recovery where this occurred on the same day as the payment, and denying it when on the day succeeding. *Wilkinson v. Johnson*, 3 *B. & C.* 428. *Cocks v. Masterman*, 9 *B. & C.* 902. In this country the current of decisions has been guided by the principle of presumed knowledge of handwriting and of opportunities of putting that knowledge into practice; and hence of allowing such recovery where there was no such presumed knowledge, and denying it where there was. Thus, where one of the indorsements was a forgery, and the acceptor paid it to an innocent holder, and afterwards discovered the forgery, he was allowed to recover back the money. *Canal Bank v. Bank of Albany*, 1 *Hill*, 287. But in *Coggill v. The American Exchange Bank*, 1 *Comst.* 113, where the payee's name had been forged by the drawer, who had himself obtained and used the money, and the drawee paid it, and afterwards brought a suit to recover back the money, it was held that he could

not recover. In *The Bank of Commerce v. The Union Bank*, 3 Comst. 230, there is a rule of limitation laid down in reference to presumed knowledge, and although it is admitted that the drawee presumptively knows the handwriting of the drawer; and hence if he pays money on a forged draft, pays it in his own wrong; yet the reason of the rule does not extend to the amount inserted; and therefore, where \$105 was altered to \$1005, and the last sum was paid, the court allowed a recovery back of the difference between the true and altered sum. A still further modification of this principle of presumed knowledge is found in *Goddard v. The Merchants' Bank*, 4 Comst. 147, in which the plaintiff having assumed the place of the drawee, and paid the bill for the honor of the drawers, *not having seen it*, he was allowed (the drawer's name having been forged) to recover back the money.

#### QUESTIONS.

What is duty of holder when note falls due? Where note or bill is payable at particular place, what, as between holder and maker or acceptor, is the consequence of failing to present it? What as between holder and drawer and indorser? What are the elements of presentation and demand of payment? What does element of time depend upon? When is day of date excluded from calculation? When term month is used, what is meant? What are days of grace, and how many? When in such case is the paper payable? When if made payable on the first of the month? How are days of grace considered? When not allowable? How when paper is payable at sight? What has legislation done in New York? When payable, suppose day of grace fall upon Sunday or some holiday? When must payment be demanded? Suppose made on previous or subsequent day? When during the day may paper be paid? When is day considered closed when payable at a Bank? Where no place of payment is designated, what must holder do? What will excuse the demand? How made in case of removal from the State? How in case of removal not from the State? How where addressed to drawer at a particular place and accepted generally? What is this a question of? How presented, and demand made, when payable at particular place? What necessary, when payable in a particular city, where maker or acceptor does not reside? What necessary to be done where

bill or note is lost? In what contingency is no presentation and demand necessary as to drawer? Has the same thing application to the indorser? What necessary where there has been acceptance *supra protest*? Who should the person demanding payment be? What should he be competent to do besides making the demand? What in relation to making the demand, is the important feature? Who makes it, in case of the death of the holder? Who in case of an assignment? Who in case of trusteeship? Who in case of an insane person? If maker or acceptor be a firm, of whom is demand made? Of whom in case of the death of one? Of whom in case of several, who are not partners? Of what must acceptor or maker be satisfied before making payment? What is all that is essential in cases free from suspicion? What should be required before payment? Of what must the indorser be satisfied before payment? And why? What must the payment be made in? How is a check regarded? When evidence of payment, when produced by debtor? What may the holder do with maker or acceptor, without discharging drawer or indorser? What can he not do without so releasing? How and when must and may contract be made having such effect? How does agreement with subsequent indorser affect right against prior one? For what reason? How may holder safely contract to give time to maker or acceptor without releasing indorser? What should party do who pays up bill or note? What risk does he run if he does not? Can drawee or acceptor who has paid a forged bill, by mistake, recover against drawer? Why? When so paid, what is the current of decisions guided by as to such recovery against innocent holder? In what respect has this principle received a modification? In what respect a limitation? What are the cases in illustration?

## PART VI.

## DUTIES OF THE HOLDER IN CASE OF REFUSAL TO ACCEPT OR TO PAY.

§ 349. The duties devolving on the holder upon dishonor of his paper, whether by refusal to accept or pay, are substantially the same. The only object accomplished by their performance, and which they are alone designed to secure, is the full and perfect remedy against drawer and indorsers. The necessity for performing them grows out of the distinction between the primary and secondary liabilities of the parties to this kind of paper. Those who are primarily liable continue so until they are legally discharged

by payment or otherwise. As to them, therefore, nothing is required to be done by the holder in reservation of his rights. But the liability assumed by the drawer and indorsers is only secondary, contingent, and conditioned upon non-payment by the principal debtor, and notice thereof given him in reasonable time. The object of this is to enable the drawer to withdraw his funds from the possession of the drawee, and the indorser to take such immediate steps as he may deem necessary to secure himself from loss. By keeping in view the reason of the rule, we shall be the better able to understand the mode or manner in which the law requires this duty to be performed.

§ 350. The holder, up to this point, has been under no necessity of enlisting in his behalf any official services. He could do himself every thing that is required to be done. The custom, it is true, is very generally established and universal among banks, to place all negotiable paper in the hands of the Notary Public to present for acceptance and payment, but for this there is no legal necessity. It is only after paper has been dishonored by a refusal to accept or pay, that the services of this official are required. And even then they are only necessary where a *protest* is required to be made. In bringing into view the *protest*, we learn one of the important distinctions between the *foreign* and the *inland* bill of exchange. The law-merchant requires the former to be *protested* in case of non-acceptance and non-payment, while in regard to the latter, no protest is necessary. All that strictly constitutes the duty of the Notary is to *protest*, and that in case only of the foreign bill; not to give the necessary notices to the drawer and indorsers. In practice, however, the whole business of protesting and giving the notices is usually done by the notary.

§ 351. Suppose the holder has done his last personal act, that is—demanded acceptance by the drawee, or payment by the acceptor, which has been refused; he then places the bill in the hands of a notary public, who is a public officer,

recognized by the law of nations, and whose acts are attested by a notarial seal. This officer again presents the bill to the drawee or acceptor, and again demands its acceptance or payment. If, however, he has made the presentation and demand originally, he need not do it a second time. All that is necessary is that a notary public should do it. The same day that he makes the presentation and demand, he *notes the fact*, or all the facts, in writing, stating time, presentation, demand, reason for refusal, if any is assigned, putting his initials to the statement; and from this he afterwards draws up the statement, which is a formal declaration of presentment and refusal, and of the facts contained in his minutes; and bears date of the time when the noting was done.

§ 352. Two questions have arisen in regard to the term *protest*; the one relates to what is necessary to be done in order to render the protest complete, and the other to what is ordinarily understood as being embraced under it. There is still another as to the person legally competent to do it. The first has arisen on an inquiry relating to the sufficiency of the notarial certificate. Here it has been held, that in order to be sufficient, such certificate, in the case of a foreign bill of exchange, must set forth the fact specifically, that the bill was presented to the drawee, at the time when demand of payment was made, or it cannot be offered in evidence. *Musson v. Lake*, 4 How. S. C. R. 262. The other question has arisen as to the extent of a waiver of *protest*, whether that is limited to the formal declaration, or extends to, and embraces, all the steps necessary to charge an indorser. The indorser wrote, "Please not protest (such a note, so due), and I will waive the necessity of the protest thereof." Held, that the term *protest*, in its popular sense, includes all the steps necessary to charge the indorser, and hence that this was a waiver of notice as well as of presentation and demand. *Coddington v. Davis*, 1 Comst. 186. The certificate of protest under the notarial seal is sufficient

evidence of the facts therein stated. Another question as to whether the notary was obliged to do the business personally, or whether he could transact it through his clerk or other agent, has been attended with considerable difficulty. The general impression is, that the law-merchant requires the services of the notary personally; and in the State of New York, that principle, together with the wording of the revised statutes, has settled the law to that effect. *The Onondaga County Bank v. Bates*, 3 Hill, 53.

§ 353. The notary public is the agent of the holder in protesting the bill or note. Having presented and demanded acceptance or payment, received a refusal, and noted the facts on the bill or note, the next thing in order which should be done, is the giving or sending notices to the drawer and indorsers. One of the most intricate branches of the law, one that has been the most refined upon, and sometimes one the most difficult to understand precisely what to do, is that which grows out of this necessity of notice. The most important points of inquiry are :

1. The kind of notice, and its contents.
2. By whom and on whom must the service be made?
3. When and how must it be served?

§ 354. The *law merchant* leaves the kind of notice, whether written or verbal, to the decision of the party who is to give it. It is sufficient if given in the mere verbal form, or it may be proved by circumstantial evidence. Any thing that will satisfy the jury as to the fact of its having been given. No particular form of it is necessary. What the law-merchant seems to consider essential is, that it must import either in express terms or by necessary implication, that the bill or note *has been dishonored*. This involves two facts :

1. That the bill has been duly presented.
2. That there was a refusal to pay it, or that it has not been paid. Mere notice that the bill still remains unpaid,

would not be sufficient, because if it had never been presented it might remain unpaid without being dishonored. The word *dishonored* seems to be sufficient to support the notice. *King v. Bickley*, 2 Q. B. 421. It usually states that the party to whom it is addressed is looked to for payment, and this was once deemed necessary. *Solarte v. Palmer*, 7 Bingh. 530. But in the case above referred to of *King v. Bickley*, it was held not necessary in express terms to inform the party whom it is intended to charge, that he will be looked to for payment, and that the sending notice of dishonor is sufficient for that purpose. The notice must also be sufficient to ascertain the note or bill dishonored. But inaccuracy of description, by which the party cannot be misled as to the bill intended, is immaterial. And where there is an error in the statement of the amount, in order to show that the party could not have been misled, it is competent to prove that there was no other note in existence to which the description given could have applied. *Cayuga County Bank v. Worden*, 1 Comst. 413.

§ 355. The notice must come from the holder or his agent, or some person entitled, or who, as party to the bill, probably will be entitled, to call for payment or reimbursement. That given by a mere stranger is insufficient, and one without any signature, is worthless. A party who is not, at the time, the holder, may give the notice, if he stands in a position in which he may become holder, as where he has transferred it to another as collateral security for a debt. A party to whom it is indorsed over to collect, may give the notice, and possession by a notary is evidence of his right to protest it, and his signature to the notice affords presumptive evidence that it was done by the authority of the holder.

§ 356. The holder, or whoever gives the notices on his behalf, should give such notice to all the prior parties on the note or bill, except maker or acceptor, to whom he intends to look for payment. The only one who has engaged

absolutely to pay, has failed in doing so, and the only chance now offered to the holder to avoid the risk of loss, is to convert the contingent liabilities of the drawer and indorsers into absolute ones by the giving of notice. It is left entirely to him what parties he will notice. If he is satisfied with the responsibility of his immediate indorser, he may give the notice to him only, and then he, on receiving it, must, in his turn, give the notice to all such prior parties to whom he wishes to look for payment. His position, upon receiving the notice, is precisely similar to that of the holder, and he may notify all the others before him, so as to be able to look to them all, or only his immediate indorser, and he the next in order, and so on until all have successively received notice. The rule, however, is that a notice given by the holder enures to the benefit of all who stand between that party and the person receiving it, and a notice given by one party to another, and communicated without *laches* by that other to prior parties, renders them liable to him who gave the first notice. Hence it is laid down as universally true, that a party entitled as holder to sue upon a bill, may avail himself of the notice given in due time by any other party to it, against any other person upon the bill, who would be liable to him, if he, the holder, had himself given him notice of the dishonor. *Story on Bills*, § 304. *Chapman v. Keane*, 3 *Ad. & Ellis*, 193. Where a firm indorse, notice to one of the members is sufficient; and so also is notice to a surviving partner. But where two jointly indorse, not being partners, notice must be given to each, and in case of the death of one, then to the survivor and the personal representative of the deceased. *Willis v. Green*, 5 *Hill*. 232. In case of the death of the indorser, it is the executor or administrator who is entitled to the notice. Notice to a general agent is a sufficient one to the principal. Notice must be given to the acceptor *supra protest* of non-payment by the drawee, in order to hold him on such acceptance. So also to the drawer and



indorsers, if, on receiving such notice and demand of payment, he declines to pay.

§ 357. The *time* and *manner of service* are among the most important things relating to notice. The question of reasonable notice is a mixed question of law and of fact. The facts are for the jury to find, while the question of *reasonableness of time*, based upon them, is for the court. It is difficult in practice for the court to control this question where there is any dispute about the facts. Where the parties live in the same village or city, the notice is to be served personally on the drawer or indorser, or sent to his dwelling-house or place of business. When in places remote from each other, the manner generally of serving the notice is through the post-office; and the time at which the notice must be served or left in the one case, and mailed in the other, is substantially the same. It may be done on the demand, refusal, and protest, but it is in time to do it on the day following. It has been made a question whether the rule is as strict as that laid down in *Lenox v. Roberts*, 2 *Wheaton*, 373, which requires that the notice should be put into the post-office *early enough to be sent by the mail of the succeeding day*; or whether it is sufficient to place the notice in the post-office on the next day, *at any time of the day*, so as to be ready for the first mail that goes *thereafter*, although it may not be in season for the mail *going out the day after the default*. The latter is now understood to be the rule in England, and in some parts of the United States. It is not, however, entirely concurred in. *Beckwith v. Smith*, 22 *Maine*, 125. The question is very elaborately discussed by Judge Shepley in *Chick v. Pillsbury*, 24 *Maine*, 458, in which he contends for the strict rule of sending out by the mail of the next day, and this would undoubtedly be the safer rule to adopt in practice. The notice is always sufficient if left in time at the dwelling-house of the party, and if the house be closed in consequence of a temporary absence, it may still be left there.

§ 358. If there is no post, it is sufficient to use the ordinary method of conveyance, as in the case of a foreign bill to send by the first regular ship. It is not necessary to resort to the postal arrangement, or to send the notice by the ordinary conveyance. It is sufficient to send by a private conveyance, or a special messenger, and it would be deemed a sufficient notice in such a case, though it should arrive a little behind the mail, provided it were upon the same day; but wherever the postal arrangements are established, the mode of sending notice by the mail cannot be safely omitted, unless under very peculiar circumstances. The service by mail where the parties reside in the same city or village is insufficient, except where there is a penny post arrangement, or the notice was actually received in time. Under a regular penny post arrangement, the service through the mail is sufficient, the parties residing in the same village or city. This, however, must be qualified by the fact that the penny post goes to the quarter where the drawer or indorser lives.

§ 359. In all cases where the service may be made by mail, there are two modes of charging the drawer or indorser with notice; the one by proving that the notice *was received* in time, by whatever mode it may have been conveyed, and the other by showing that the notice properly directed and prepaid was deposited in the post-office, to be forwarded at the proper time. In the latter case, the receipt in time is presumed, and even if it be shown never to have been received, it is, nevertheless, a sufficient notice. The holder, or his agent, has done what the law requires of him, and if the post-office fails in its transmission and delivery, it is not chargeable to him. The rule is to direct the notice to the post-office nearest the place of residence of the drawer or indorser, and if there are two post-offices, at each one of which he is accustomed to receive letters, it may be directed to either. The question as to which of the two should be entitled to notice, the residence being where the note was

made payable, or the place of business being a distant city, came up for settlement in *Van Vechten v. Pruyn*, 3 *Kern*. 549, and it was held to be the place of residence. So also where the indorser received his letters and did his post-office business in the town where the note was made payable, but resided in an adjoining town, where the notice was sent by mail, it was held sufficient. *Seneca County Bank v. Neass*, 3 *Comst.* 442. The authorities fail to decide at what distance from a post-office the party may reside, and yet have a service through the mail directed to him there, a good service. The only safe way, however, is, when his residence is some distance in the country, to send out the notice to be served personally on him, or be left at his dwelling-house.

§ 360. The holder may not know where the drawer and indorsers respectively reside, and the inquiry becomes important what in such case becomes his duty. This is summed up by saying that he is bound to make diligent inquiry; to inquire of the persons by whom, and the places at which, this knowledge would be the most likely to be acquired. A delay beyond the time at which he would otherwise be required to give notice may thus be necessarily incurred before he is able to give the notice. Such delay will not destroy his right against the indorser. *Bateman v. Joseph*, 12 *East*. 433. His plain duty is, as soon as he acquires the knowledge from a competent source, to make use of it by sending the notice. And if he has thus acquired it, and thus makes use of it, he will hold the indorser, although he sent to a wrong place, and if subsequently better informed, will not be obliged to send a new notice. *Lambert v. Ghiselin*, 9 *How. S. C. Rep.* 552. The latter part of the above proposition has not, however, been acquiesced in, and the principle has been affirmed, that inability to discover the residence of the indorser excuses the proper service only so long as such inability continues, and that, when the residence becomes known to the party wishing to hold

the indorser, it is then his duty to be diligent in making service. *Beale v. Parrish*, 20 *N. Y. Rep.* 407. The main point decided in this case is, that, although notice of non-payment given by the holder of a note to an indorser enures to the benefit of the other parties to the paper, an inability to learn the proper place for giving such notice which excuses the holder, is not available to another indorser who possesses the necessary information.

§ 361. It is very well settled that a check given upon a bank payable immediately, is in time if presented the day subsequent to its receipt, and if protested on that day, and notice given the day following, gives to the holder a perfect remedy against the indorser. But the drawer of a check occupies a very different position from the drawer of a bill of exchange, and is not exonerated from liability by the want of notice of non-payment, unless some special damage can be shown to have resulted therefrom. If the notice is given successively by each party to the one who immediately precedes him, then each in succession is entitled to the same time in giving his notice, as was the holder in giving it to his immediate indorser. But the holder, if he desires to look to all the preceding parties for his indemnity, should give notice at the same time to all such parties; and it has recently been held that to entitle himself to a remedy against a remote indorser, he must give the notice within the same time required of him in order to hold his immediate indorser. *Rowe v. Tipper*, 20 *Eng. L. & Eq.* 220.

§ 362. There are several instances in which prior parties may be held liable to the holder without receiving any notice. As:

1. Where an indorser unites with the drawer in deceiving the holder, representing that a bill will be accepted when he knows it will not; although mere knowledge that a bill will not be paid at maturity will not have that effect.

2. When an indorser has transferred a note upon which nothing is due or collectable.

3. No notice need be given to the drawer when he had no funds in the hands of the drawee; or any right to expect his acceptance or payment. But this does not excuse the want of notice to the indorser.

4. Where the indorser has taken from the maker an assignment of all his property, as he then must know his perfect inability to pay it. Neither is it necessary if he takes an assignment of property amply sufficient to pay the note, as any notice then would be unnecessary. But unless it is shown to be sufficient, the usual notice is required. *Seacord v. Miller*, 3 *Kern*. 55. This doctrine is very much narrowed down by Ch. Jus. Gibson in *Kramer v. Sandford*, 4 *Watts & Serg.* 328. So, also, is it entirely competent for a drawer or indorser, by a special agreement, to waive the giving of notice, and no consideration is necessary to support such a waiver. And in the absence of such notice a subsequent promise to pay, made by the party entitled to it, with full knowledge of the fact of the omission, although in ignorance of its legal effect, will be sufficient to restore his liability. And the knowledge of such fact, it seems, may be inferred from the promise, in connection with the accompanying circumstances of the case, without requiring affirmative proof of the knowledge. *Lundie v. Robertson*, 7 *East*. 231.

#### QUESTIONS.

What creates the necessity of performing the duties here contemplated? What the difference between the two liabilities? What is the object of giving the notice? When are the services of a Notary Public first required? When are they then only necessary? What is one of the distinctions between foreign and inland bills of exchange? What is all that constitutes the strict duty of the Notary Public? What is usual in practice? After demanding acceptance or payment, and refusal, what does the holder next do? What does the Notary Public do? What does he do on the same day he makes the presentation and demand? What does he subsequently do, and to what time does it have relation? What is the first question regarding the term protest? What the second? What is still one other? How has the first arisen? What is necessary relating to presentment to drawee? What does the waiver

of protest embrace? How is notarial certificate evidenced? What does the law-merchant require as to the doing of business by the Notary? What next should be done by the notary after presenting, demanding, and noting? What are the important points of inquiry regarding the notice? Who decides on the kind of notice, whether written, or verbal? What does the law-merchant consider essential in the notice? What are involved in the term dishonor? What is deemed sufficient to support the notice? What is usually stated in it? What is necessary as to ascertaining the bill or note? How far may inaccuracy in description go without being fatal? How may it sometimes be remedied? From whom must the notice come? How is it when given by a stranger? May it be given by a party not at the time the holder, and when? To whom should the holder give notice? To whom, if satisfied with his immediate indorser? And how is that indorser situated on receiving the notice? And what may he do? What is the rule as to notice given by the holder? And to whom is it available? What is the rule where indorsed by a firm? What where two indorse jointly? What, in case of death of the indorser? What when indorser has a general agent? What when there is acceptor *Supra Protest*? What are among the most important things relating to notice? What is reasonable notice a question of? Where parties live in the same village or city, how is notice to be served? How when living in places remote from each other? When may notice be sent or mailed in each case? What the rule as to deposit in time for the mail of the next day? How sent where there is no post? How as to necessity of sending by post where there is one? What is the safer way where there is a postal arrangement? Where parties live in the same city or village, when is service good by mail? Where must penny post go to render such service good? What modes are there of charging drawer and indorser with notice where service may be made by mail? What may be shown to charge indorser where service is by mail? Suppose the post-office fails to transfer and deliver? To what post-office is notice to be directed? How if two post-offices, at each of which indorser is accustomed to receive letters? How when residence is where note is payable, and place of business elsewhere? How where reverse of this is the fact? What is the safe mode where residence is in the country? What is holder's duty when he is ignorant of residence of drawer and indorsers? What effect, in such case, has delay in making inquiries? What is his plain duty? What effect of sending to a wrong place? What to be done when residence becomes known? When is a check payable immediately presented in time, protested, and notice given? How is drawer of a check situated in reference to notice? What time is each successive party entitled to in giving the

notice? What must holder do, if he desires to hold responsible to him all the parties on the bill or note? What are the instances in which prior parties may be held liable in the absence of notice? What first stated, and so on? What rule as to waiver? What rule as to promise to pay?

## PART VII.

### RIGHTS AND REMEDIES OF THE HOLDER.

§ 363. The neglect of the holder to perform any of the duties just enumerated, subjects him to the loss of all remedies against the drawer and indorsers, and limits him to those only whose liability is primary and absolute. His faithful performance of them enables him to look to any and all the parties on the bill or note for his indemnity. And he can take his own time anywhere within the range of the statute of limitations for doing it. I am speaking, of course, of the right irrespective of any State legislation; as some States have passed laws exempting the indorser from liability unless the maker is first prosecuted, and sometimes limiting the period within which that must be done to retain the remedy against the indorser. It is also competent ordinarily to commence at the same time, and continue the prosecution to judgment and execution against all the parties to the bill or note; but a satisfaction against one is a satisfaction against all; and in many or most of the States but one full bill of costs is collectable; and in all the other cases arising out of the same piece of negotiable paper, only the necessary disbursements.

§ 364. The holder of negotiable paper, as we have already seen, is, under certain circumstances, clothed with peculiar rights. Receiving it before due, in good faith, and for a valuable consideration, he is only affected by such defences as are created by statute, or as necessarily vitiate or destroy his title. If a statute, like that prohibiting usury in the State of New York, renders the paper void in whosever hands it may be, such *bona fide* holder can claim no protection. So, also, if the name of the payee as first in-

dorser is forged, as that indorsement is the only avenue of title, the holder must fail to make out any, and hence cannot succeed. The defences the most commonly sought to be interposed, are :

The want of consideration, total or partial.

The obtaining the bill or note by duress.

The obtaining the same through fraud.

The finding it when lost by the owner.

The receiving it to be applied for a certain purpose, and applying it to a different one.

The obtaining it by an act of larceny.

§ 365. In regard to all such defences, there is no difficulty in their being interposed as between the original parties to the bill or note. The payee, when holder of the note or bill, has no other or different rights against the maker or acceptor, than has a party to any other contract against another. All defences may then be interposed the same as in other contracts. It is only the *bona fide* holder receiving the same before due for value that is protected, and the question occurs how these defences can be made available when the note or bill is in the hands of a party other than the payee. As already seen, such party is presumptively a *bona fide* holder, and hence entitled to protection. But this is a mere presumption, and capable of being rebutted. In all such cases, therefore, such holder, showing the transfer, through the proof of the handwriting of the first indorser, is *prima facie* entitled to recover. This shifts the burden of proof to the defendant. He, in turn, interposes and makes proof of one of the defences above stated. This is held to make out a *prima facie* defence ; such a defence as will entitle it to prevail, if the proofs on both sides stop there. The effect of all this is again to shift the burden of proof from the defendant to the plaintiff. Enough is now shown on the defence to do away with the presumption under which the plaintiff had hitherto sheltered himself, and to call upon him to show the time and circumstances under which he



received the note. Failing to do that, he is beaten. But if he then shows that he received the note before due, in good faith, and for value; in other words, if he transfers into fact what had previously rested in mere presumption, he has entirely disposed of the defence, and entitled himself to recover. *Rogers v. Morton*, 12 *Wend.* 484; *Munroe v. Cooper*, 5 *Pick.* 412.

§ 366. The holder may acquire a right to bring an action against the prior parties to a bill of exchange, to enforce its collection before the time has elapsed at which it is made payable. This occurs where he has presented it to the drawee for acceptance, who has declined to accept, and the proper notices have been served upon drawer and indorsers. These, by drawing and indorsing, have impliedly undertaken that the drawee, on presentation to him for that purpose, should accept, and hence his declension has broken their contract, and thus rendered them immediately liable. The holder, therefore, unless there be an acceptance *supra protest* which he chooses to receive, is at liberty to pursue his remedy immediately against such drawer and indorsers.

§ 367. A question has arisen of great practical importance, relating to the right of the holder to hold a bank responsible for the amount of the bill or note, where it has been left there for collection, and through failure to present for acceptance or payment, the drawer and indorsers have become discharged. The strongest case presented, is where the bank, receiving it for that purpose, has turned it over to its Notary Public, or sent it to a bank with which it is in correspondence at the place where the paper is made payable, and by some means there has been such failure as to destroy all remedy against drawer and indorsers. In the State of New York, it is clearly settled by several decisions in the highest courts, that the bank so receiving it, is liable to the holder. *Allen v. The Merchants Bank*, 22 *Wend.* 215; *Walker v. The Bank of the State of New York*, 5 *Seld.* 582. *Commercial Bank of Pennsylvania v. The*

*Union Bank of New York*, 3 *Kern*. 203. The contrary doctrine seems to have been held in the Supreme Court of Errors in Connecticut in *East Haddam Bank v. Scovill*, 12 *Conn.* 303.

§ 368. A person who pays a bill *supra protest*, for the honor of an indorser, is placed legally in the same position as if he had taken from such indorser a transfer of the same, and has, therefore, a right to take advantage of any notice of which the person for whom he made the payment could have availed himself. *Goodall v. Polhill* 1 *C. B.* 233.

§ 369. The inquiry may properly arise as to the rights and remedies of the holder of a lost bill or note. If such holder be the payee and holds it unindorsed, his loss may not subject him to much inconvenience, as no finder or transferee can, in such case, get a title to the paper. He ought, however, immediately to give notice to the maker or acceptor and drawer. If he be an indorsee, the payee having indorsed it in blank, and it has not yet fallen due, he should not only give notice to all the parties upon it, and to the bank, if any, where it is payable; but should also advertise in the public newspapers, and by every accessible means give the notice as extensively as possible. In such case it may be submitted to the jury as a question of fact whether such holder had used due diligence in apprising the public of the loss, and also whether the purchaser of the paper had, under the circumstances of the case, exercised a reasonable discretion, and acted with good faith and sufficient caution, in the receipt of the bill or note. Subject to the possibility of rendering the above question sufficiently clear to a jury in both its branches or aspects, the English rule is, that if a negotiable bill or note be lost at the time a party is called on to pay, the loss constitutes a good defence. In this country, in some States, a statute provides for an indemnity to the party called on to pay; and upon its being given, allows a recovery against him. In other States,

the courts, without a statute, require the indemnity. In others, the English rule prevails. Where, without a statute, the indemnity is required, it is properly a matter of Chancery jurisdiction.

### QUESTIONS.

What does neglect of the holder to perform duties enumerated subject him to? What does his performance of them enable him to do? Within what time? How many may holder proceed against at same time? What effect has a satisfaction against one? What peculiar rights may a holder of negotiable paper have, and under what circumstances? What two species of defence may still be interposed? What are the defences the most commonly sought to be interposed? When may any one, or all these, be interposed? Who is the party protected against them? How can these defences be made available? What is the legal presumption? What must the holder show to make out his case? On whom then is the burden of proof? What may the defendant show to make out a *prima facie* defence? What is the holder then called upon to show, and what may he show to entitle himself to recover? Can a holder acquire a right to bring action against parties to the bill before it becomes due? How may he acquire such right? Under what circumstances may the holder hold a bank responsible where there has been a neglect in charging drawer and indorsers? To what is a person who pays *supra protest* entitled? What must the holder of a lost note do? What question of fact may be submitted to the jury? Subject to this, what is the English rule as to recovery on a lost note? What is the rule in the different American States?

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## CHAPTER III.

### GUARANTY AND SURETYSHIP.

#### PART I.

##### NATURE, FORM, AND ESSENTIALS OF THE CONTRACT.

§ 370. A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance.

ALBANY, May 1, 1860.

In consideration that A B furnishes to C D, goods at six months credit to an amount not exceeding one thousand dollars, I guarantee the payment thereof.

SAM SLICK.

Or—

ALBANY, May 1, 1860.

In consideration that A B gives to C D, an additional credit of six months on his debt of one thousand dollars now due, I guarantee the payment thereof.

SAM SLICK.

From the nature of guaranty as thus defined, and the examples given, it will be easy to gather up the essentials that enter into this species of contract.

§ 371. The first of these is the *consideration* upon which it must rest. The similarity between this species of contract and that embodied in the indorsement of negotiable paper, early led to a doubt, and even a denial, that its validity at all depended upon any consideration appearing upon its face. *Pillans v. Van Mierop*, 3 Burr. 1663. But the point afterwards came up before the House of Lords in *Rann v. Hughes*, in which it was held that a consideration was indispensable. 7 Brown P. C. 27; Also 7 T. R. 350. *Note a.* The analysis of the consideration is the same here as in the case of ordinary contracts, with the marked exception, that the advantage or benefit, instead of accruing, as in other cases, to the party promising, must accrue to the party on whose behalf the promise is made. The party who guarantees, need not derive any benefit from the contract. No past or executed consideration is sufficient to support the guarantee's undertaking, unless the act or service was done at the request of the party promising.

§ 372. The second essential is, that there must be a *principal debtor*. The undertaking of the guarantee or surety is *accessorial*, and must, therefore, relate to the same

subject as the principal obligation. It must not be larger, or more onerous, than that obligation; although it may offer a more prompt and efficient remedy. It may pledge a judgment or mortgage, while the principal debtor encounters only a personal liability. The undertaking of the surety, although in form accessorial, may, under certain circumstances, assume the character of a principal debtor. This occurs where he guarantees, knowing that the contract of the principal debtor is void on account of his incapacity, as in case of minority or insanity. He then incurs a primary liability.

§ 373. The third requisite is the *consent of the party to whom the promise is given*. The elements of the contract, so far as the surety is concerned, are not complete without the obtaining of that consent. A very important consequence follows from this, viz.: that a simple proposal or offer to guarantee, amounts to no contract that is legally binding until the party to whom it is made has signified his acceptance. Thus a party writes:

“GENTLEMEN,—Mr. France informs me that you are about publishing an arithmetic for him and another person, and *I have no objection to being answerable as far as £50.*”

Held only a *proposal*, and that the party to whom it was made, if he intended to accept, should have communicated such intention to the party making it. *Mozley v. Finckler, Crompt. Mees. & Ros.* 692. The guarantor has clearly a right to know whether he is acting in that capacity or not, and the Supreme Court of the United States have more than once decided that when a guaranty is prospective, and to attach to future transactions, the guarantor is entitled to notice that it has been accepted and acted upon. *Lee v. Dick*, 10 *Peters*, 482. *Adams v. Jones*, 12 *Peters*, 207. But where an absolute guaranty is given at once, as in the two forms given in § 370, no notice of acceptance is neces-

sary ; but the party to whom it is given may act on it without further communication. *Oxley v. Young*, 2 H. Black. 613.

### QUESTIONS.

What is a guaranty ? What the form of one ? What is the first essential ? Wherein does its analysis show a difference between this and other contracts ? What is the second essential ? What is the undertaking of the surety ? To what must it relate ? In what respect may it differ from the principal obligation ? What is the third requisite ? What consequence follows the necessity of obtaining consent ? What illustration ? What has the guarantor a right to know ? What is the guarantor entitled to, when the guaranty is prospective ? How when it is an absolute guaranty ?

### PART II.

#### DIFFERENT KINDS OF GUARANTY, AND MANNER IN WHICH IT IS AFFECTED BY THE STATUTE OF FRAUDS.

§ 374. The terms *warranty*, *guaranty*, and *suretyship*, do not differ much in their essential principle, although they may, in the subject-matter to which they are applied. Those of warranty and guaranty have the same original derivation, and in the old law books were used as convertible terms. The former has come, by use, to have two applications, the one relating to title both to real and personal property, and the other to insurance, being certain stipulations or agreements on the part of the insured, which constitute the inducements to the insurer to enter into the contract. The suretyship and the guaranty cannot essentially differ, the former being defined as an accessory agreement, by which a person binds himself for another already bound, and promises to the creditor to satisfy the obligation, if the debtor does not. A distinction has been attempted to be drawn by considering that the surety assumes to pay for another, and makes himself directly and unconditionally, although jointly, answerable for the debt ; while the guarantor merely undertakes to pay if the principal does not, thus

leaving the contract of suretyship unaffected by the statute of frauds, while that of guaranty is subject to it. But this does not seem to be generally adopted. The doctrine of suretyship is derived, in many respects, from the civil law, while that of guaranty, from its frequently dealing with negotiable paper, and other common contracts relating to business, is more mercantile in its origin and character.

§ 375. There is no doubt of the general principle that that provision of the statute of frauds requiring any promise to answer for the debt, default, or miscarriage of another person to be in writing, expressing the consideration, and signed by the party to be charged, applies with full force to the contract of guaranty or suretyship. That is in every possible sense *a collateral engagement for another*. There is, nevertheless, great conflict in the cases relating to its application. In the case of *Leonard v. Vredenburg*, 8 *John*. 29, Chancellor Kent, then Chief Justice, classifies the cases in reference to the application of the statute. He divides them into three classes :

1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here he remarks, There is not, nor need be, any other consideration than that, moving between the creditor and original debtor.

2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise.

3. A third class of cases is when the promise to pay the debt of another arises out of some new and original consid-

eration of benefit or harm moving between the newly contracting parties.

The two first classes of cases are included within the statute of frauds, while the third is not.

No fault has been found with this classification, only with the decision of the court in the case in which it is made. There a note in the ordinary form was made, and below the defendant wrote, "I guarantee the above," and signed it. The court held the guaranty sufficient within the statute, and the defendant liable. The question whether a simple guaranty, as "I guarantee the within or above," or "I guarantee the payment of the within or above," without any statement of consideration, although made at the same time, and, in fact, a part of the same transaction, as the note or instrument which it guarantees, is sufficient to enable a recovery under the statute of frauds, is an exceedingly vexed one in our jurisprudence. This sufficiently appears from the fact that the cases of *Manrow v. Durham*, and *Hall v. Farmer*, the first reported first in 3 *Hill*, 584, holding it *not within the statute*, and afterwards on appeal reported in 2 *Comst.* 533, the judges of the Court of Appeals being equally divided, and hence the decision of the Supreme Court remaining; the last reported first in 5 *Denio*, 484, the Supreme Court holding under substantially the same state of facts that the case *was within the statute*, then again on appeal in 2 *Comst.* 553, in which the judges of the Court of Appeals, being again equally divided, the judgment of the Supreme Court stood, *pro forma*, affirmed. The point came again up before the Court of Appeals in the case of *Brewster v. Silence*, 4 *Selden*, 207, in which the court, with but one dissenting voice, affirmed the judgment of the Supreme Court, reported in 11 *Barb.* 144, holding it to be a case *within the statute*, and hence that the consideration not being expressed, the plaintiff could not recover. The court regarded the contract of guaranty as in itself distinct from that embodied in the note or instrument guaranteed,



and hence must contain, in and of itself, sufficient to render it a valid contract. Thus we may hope this vexed point is finally settled in the jurisprudence of this State, and, perhaps, country.

§ 376. Another vexed question has arisen out of the following facts. A owes to B \$100. B presses for payment. A offers C as surety, who is accepted.

A gives to B, payable to *him, or order, and not to C*, a note in the following form, "Six months after date, I promise to pay to the order of B, \$100, value received—signed A. This, before delivery, is indorsed by C in blank. What is the liability of C?

In Vermont he is liable as *joint maker*. *Sylvester v. Downer*, 20 *Vt.* 355.

In Louisiana as *surety*. *McGuire v. Bosworth*, 1 *La.* 248.

In Ohio as *guarantor*. *Robinson v. Abell*, 17 *Ohio*, 36.

In Missouri, Massachusetts, Maine, New Hampshire, South Carolina, Michigan, Indiana, and Texas, he would be a *joint promissor*. In Alabama a *surety*. In the State of New York, he ranks now clearly as an *indorser*, and hence is discharged by any such *laches* on the part of the holder as discharges the indorser. *Hall v. Newcomb*, 7 *Hill*, 416; *Spies v. Gilmore*, 1 *Comst.* 321.

§ 377. The next question that arises relates to the rights and liabilities of a party who has, in legal form, guaranteed the payment of a promissory note which was made payable to bearer. Would a neglect to present, demand payment, and give notice, such as would discharge the indorser, effect the discharge of such a party? Although there is some conflict in the authorities, yet the better opinion seems to be, that the guarantor, in such a case, is to be treated, not as an indorser, who makes a conditional contract, but as a guarantor, who makes an absolute agreement that the note shall be paid at maturity; that his contract is, therefore, broken, when there is a neglect to pay; and that it is no

part of the holder's agreement to give notice of non-payment. *Brown v. Curtis*, 2 *Comst.* 225. A different doctrine, however, prevails in the States of Massachusetts, Maine, and Pennsylvania, in which the contract of the guarantor is regarded as conditional, and if the maker of the note, or principal debtor, is solvent when the debt falls due, the guarantor is entitled to reasonable notice of non-payment. *Oxford Bank v. Haynes*, 8 *Pick.* 423. *Canon v. Gibbs*, 9 *Serg. & Rawle*, 202. It is conceded, however, that where the guaranty is that the note is *collectable*, proceedings to collect must be instituted against both maker and indorser before recourse can be had to the guarantor. *Loveland v. Shepard*, 2 *Hill*, 139. And although in an ordinary guaranty, the guarantor, if he desires notice, should stipulate for it in his contract; yet in view of the conflict of authorities, the safer way, in all cases, is to give it; more especially as some of the cases lean strongly to its necessity, where the guarantor can show that he has sustained special damages from its neglect.

§ 378. Another question that has arisen out of the fact of guaranty, more especially in its connection with negotiable paper, relates to its negotiability. Is a guaranty negotiable either in connection with the note it guarantees or separately? The difficulty experienced is to determine whether it is to be regarded as merely a special contract between guarantor and guarantee, or whether it is transferable by the latter, and equally available to his transferee. It seems pretty clearly settled that where the guaranty is on negotiable paper, and is, by its terms, limited to no particular person but to the payee or his order, or to bearer, it is a complete guaranty to every successive person who shall become the holder of the paper. *Story on Bills*, § 458. *McLaren v. Watson's executors*, 26 *Wend.* 425. The point the most controverted is whether this is not equally true when the guaranty is on a separate instrument. In the latter case, the prevailing opinion is, that it is then to be regarded as a

special contract, and hence, at common law, enforceable only by the party to it, or by his assignee, in his name, and subject to the equities existing against him.

§ 379. The guaranty is to be strictly construed. The case, to warrant a recovery, must be brought within the express terms of the instrument, and the liability of the surety is never to be extended by implication. When it is special, and addressed to a particular individual, he alone has the right to act upon and acquire rights under it. If, however, the guaranty is general, as a general letter of credit, then any one, by complying with its terms, becomes a party to the same, as if it had been special to him. There must be no departure whatever from the strict terms of the contract, and if the guarantor agreed to pay drafts at sixty days' sight, he is not bound by drafts at ninety days' sight. *Birckhead v. Brown*, 5 *Hill*, 634. So also if payment by a vendee be guaranteed on condition that the vendee will give credit until a specified time, the guarantor will not be liable if a shorter credit be given, although the vendee did not require payment until the specified time. *Walrath v. Thomson*, 2 *Comst.* 185. Where A was a clerk in a bank, and it was guaranteed that he should "well and faithfully perform the duties assigned to and the trusts reposed in him," it was held to apply only to his *honesty* and *not ability*; and that a loss through the latter was not covered by it. *Union Bank v. Clossey*, 10 *John.* 271.

§ 380. Another question of great doubt and difficulty has occurred in determining what shall, and what shall not, be held as a continuing or standing guaranty. For instance, the following guaranty is made: "I guarantee the payment of all such sums, not exceeding £3,000, which shall, at any time hereafter, be advanced by the plaintiff to A." The point to determine is, whether this is a continuing or standing guaranty to that amount, and thus that, however numerous the charges and credits may be, the guarantor may be held ultimately for any balance, at any future time,

up to that amount; or whether it must be taken simply as a guaranty for advances once made to the extent of £3,000. It will be seen that this is a question of vast importance to the mercantile world; one that may vary with every case presented; and one, too, of very difficult settlement. There is no other mode of settling the question, than of resolving it, in each case, into a question of *intent* of the parties, to be arrived at through the language they have embodied in the instrument. In the case supposed, it was held not to be a continuing guaranty. *Kirby v. Duke of Marlborough*, 2 *M. & S.* 18. A few other illustrations will, perhaps, more familiarize these species of guaranty to the minds of business men.

The guaranty is "For any goods he hath or may supply W. P. with, to the amount of £100." Held, a continuing or standing guaranty to that extent. *Mason v. Pitchard*, 12 *East.* 227.

"We consider Mr. J. V. E. good for all he may want of you, and we will indemnify the same." Held, not a continuing guaranty. *Whitney v. Groot*, 24 *Wend.* 82.

"I hereby agree to guarantee to you the payment of such an amount of goods, at a credit of one year, interest after six months, not exceeding \$500, as you may credit to J. H. P." Held, not a continuing guaranty, but exhausted by a single purchase to the amount mentioned. *Fellows v. Prentiss*, 3 *Den.* 512.

"Sir, I will be responsible for what stock M. E. McKee has had, or may want hereafter, to the amount of \$500." Held, a continuing guaranty, and not exhausted by purchases of and payments for stock to the amount mentioned. *Gates v. McKee*, 3 *Kern.* 232.

"I consider myself bound to you for any debt he may contract for his business as a jeweler, not exceeding one hundred pounds, after this date." Held, a continuing guaranty, not confined to one instance, but applying to debts successively renewed. *Mede v. Wells*, 2 *Campb.* 413.

These continuing or standing guaranties, consisting, as they do, in the power or authority given to another to continue the furnishing of goods upon the credit of the guarantor, may at any time be revoked as to any future liabilities, by serving the proper notice upon the party guaranteed. This, however, cannot affect any act already done under the guaranty.

### QUESTIONS.

What three terms come under the same principle? What two have the same derivation? What applications has the term warranty? What is the definition of suretyship? What distinction has been attempted to be drawn between suretyship and guaranty? What provision of the statute of frauds applies to guaranty and suretyship? What is the classification of cases arising under the statute? What is understood to be the rule finally settled as to the liability of the guarantor of negotiable paper where no consideration is expressed? What are the different liabilities of an indorser of a note payable to the order of another, where such indorser is proposed and accepted as a surety? What are the rights and liabilities of the guarantor of a note payable to bearer? Is such to be treated as an indorser, and as such entitled to notice? What is the character of his contract, is it conditional or absolute? What is necessary where a note is guaranteed to be collectable? What is the safer way in regard to notice? And why? Is a guaranty negotiable in connection with the note on which it is written? Is it so when on a separate instrument? How is a guaranty to be construed? How must a case be brought to warrant a recovery? To whom is a guaranty available when addressed to an individual? To whom when general? What is the rule in regard to departure from the terms of the contract? What illustrations? What is the difference between a guaranty to be performed at once, and a continuing, or standing guaranty? What is it that controls in the matter, and decides in each case? What illustrations? How may continuing or standing guaranties be revoked?

### PART III.

#### MODES OF EXTINGUISHING THE CONTRACT OF GUARANTY OR SURETYSHIP.

§ 381. One of the modes by which the liability of the guarantor may be terminated is by the *expiration of the time for which it had been assumed*, and to which it was

limited. And if without limitation, it may be *terminated by notice*. So, also, the contract may be extinguished by the *acts of the parties*; as if the undertaking of the surety were *subject to a condition*, which has not been performed. It may be extinguished by *payment*, either by the principal debtor or the surety. In reference to this, some difficult questions sometimes arise as to the application to be made of payments which have been made by the principal to a creditor with whom he has transactions, out of which have grown debts independent of that guaranteed by the surety. The general principles regulating the application of payments, have already been briefly considered, and the only question here is, whether the law will raise so strong an equity in favor of the surety, as to compel the application of money payments in his favor; or whether it will allow the debtor and creditor, under the principles already mentioned, to make such application, regardless of the wishes of the surety. This is a matter which the law leaves entirely to the parties, and the surety is denied all rights relating to such application. *Collins v. Gwynne*, 9 Bing. 544.

§ 382. Another method of extinguishment is by *compromise*, viz.: the receiving a less amount in full satisfaction. A compromise between principal and creditor discharges the surety, unless the latter has previously, by part payment and giving security for the balance, so made the debt his own as to enable the creditor to hold him for any balance over and above what he received from the compromise. It is, however, entirely competent for the creditor, in compromising, to reserve all rights and remedies against the sureties, and if so, although the principal may be discharged, yet the sureties are still liable; and after having been compelled to satisfy the claims of the creditor, they may then look for their indemnity to their principal, notwithstanding his compromise with the creditor. The law will not protect him if he has failed to protect them in his settlement. The effect of a compromise between the cred-

itor and the surety does not discharge the principal, although he is liable only for what the creditor has failed to realize through the surety. So a creditor may compromise with one of the sureties without impairing any right he may have against the others, except that he can recover against them only the proportion they would have paid, supposing the compromising surety had contributed his full share.

§ 383. Another mode of extinguishment is by *release*. And this may, in some cases, be a matter of inference, as where the creditor restores to his debtor the writing which contains the obligation. But the restitution of an article pledged for a debt, will raise no presumption of a release of the debt itself. A release of the principal discharges the sureties, but a release of the sureties will have no such effect upon the principal. But if the co-sureties were entitled to have recourse against the one discharged, then such discharge has the effect of liberating them from all liability for any such sum as they could have had recourse against him, had he not been discharged.

§ 384. There is also another mode of extinguishment, by *merger*, which occurs where the creditor accepts from his debtor a higher security than that under which his former debt rested, as a bond for a simple contract debt. This, if not received as collateral security, merges and extinguishes the former debt. This is limited to the case where the original debtor himself enters into the higher security. So, also, is it limited to the acceptance of a higher security. The receiving one of equal or inferior degree, is no extinguishment.

§ 385. Another mode by which the surety's liability may be extinguished, is by the creditor's *giving time to the principal, without the surety's consent*. Where a valid agreement to this effect is made, reposing upon a sufficient consideration, by which, for the time specified, no remedy can be pursued against the principal debtor, that, of itself, releases the surety. The reason of this is, that it deprives

the surety of a right which he would otherwise have, of discharging himself the debt, and then of proceeding immediately to collect it of the principal. This will indicate the kind of contract necessary to exist between the principal and the creditor to work such a discharge. If such contract be conditional, depending upon the performance of some act by the principal which he neglects to perform, thus rendering it inoperative, it will produce no such result upon the surety. The creditor may perform some acts analogous to the giving of time, and producing the same effect; such, for instance, as the taking out an execution against the principal, acquiring a lien upon his property, and then withdrawing it. The surety, in any of these cases, will not be discharged if he gives his consent, knowing all the facts, or if the agreement, by its terms, expressly reserves the right of proceeding against the surety; because a recovery and satisfaction against him would entitle him to proceed immediately against the principal.

§ 386. Another mode by which the liability of the surety may be extinguished, is by *alteration of the contract* upon which he is surety, by any addition, abstraction, or deviation, without his consent. Such an alteration has the effect of substituting a new contract in the place of the old, and thus of discharging the surety.

§ 387. Another mode of extinguishing the surety's contract, or rather of avoiding originally the formation of a legal contract, is the practice upon him of such *fraud* and *imposition*, as operates to deceive him. To have this effect, the fraud may either be practised by the creditor in relation to the obligation of the surety, or by the principal debtor, with the knowledge or assent of the creditor. So, also, if the debtor's original obligation can be avoided by fraud, the surety may avail himself of that fact in defence. The doctrine, as laid down by Chief Justice Tindall in *Stone v. Compton*, 5 *Bingh. N. C.* 142, is that "if, with the knowledge or assent of the creditor, any material part of the



transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud." The facts which called out this doctrine, and to which it was applied, were: A was indebted to B in the sum of £500, and was desirous of obtaining a further loan. A and B agree together, that B shall advance A £1,500, and that B shall deduct from it to repay himself, the sum of £500. C is surety for A, and is ignorant of this agreement. He becomes such surety, believing that A had the full benefit of the whole £1,500, instead of the £1,000. Held, that the surety was not liable, that his agreement to become such was void on the ground of fraud. Another illustration is found in *Middleton v. Lord Onslow*, 1 P.

*Williams*, 768, in which the creditors of A agree to accept a composition in discharge of their demands, upon having the composition-money secured to them by a third party. One of the creditors privately prevails upon A to give him security for the residue of his debt. Held, that such security is discharged from his liability, on the ground that the agreement is a fraud upon him, as it deprives the debtor of the benefit which the surety intended he should have.

§ 388. Another thing that may modify or destroy the liability of the surety, is *mistake*; and this may regard either the *principal motive or consideration* that induced the entering into the contract; or the *person*, or rather *character* sustained by the party to it; or the *subject-matter* of the contract itself. Any such mutual mistake in relation to either one of these as would have led to a different result, had the facts been known, will be clearly sufficient to extinguish the surety's obligation.

§ 389. Another mode of extinguishing the surety's obligation, is by what is technically termed *confusion*, which

means the union in the same person of the rights of the creditor and the obligations of the surety or debtor, in respect of the same debt. The original debtor or surety may, for instance, become the heir of the creditor, or the creditor may become the heir of the debtor or surety. In the first instance, as heir, he succeeds to all the rights of the deceased, and becomes in that character debtor for the debt of which he is creditor on his own account. In the second, the creditor, becoming the heir of his debtor, becomes in that quality of heir, the creditor of that same debt of which he is debtor on his own account. Thus the rights and obligations that belong to one capacity, by the transfer over to another, become so utterly confused, that a total extinguishment is the inevitable consequence. The extinguishment of the principal debt by confusion, operates as an extinguishment of the obligation of the sureties. But the extinction of the accessory obligation of the surety from the same cause, does not operate as an extinction of the principal obligation.

#### QUESTIONS.

What is the first mode by which liability of the guarantor may be terminated? How may it be terminated by acts of the parties? How by payment? By whom? What question may arise in relation to application of payments? How is it answered? What is another mode of extinguishment? What will prevent a compromise between creditor and principal from discharging surety? How may compromise be made without that effect? What effect of compromise between creditor and surety? What effect of compromise between creditor and one of the sureties? What is another mode of extinguishment? When may release be a matter of inference? What effect has release of the principal? What, release of the sureties? What, if co-sureties, entitled to have recourse against the one discharged? What, another mode of extinguishment? When does it occur? What illustration of it? What are the limitations? What another mode of extinguishment? What is necessary to this? What is the reason? What does this indicate? Suppose contract conditional and condition not performed? What act may creditor do analogous to giving time? Suppose agreement reserves right of proceeding against the surety, what effect then? What is another mode of extinguishment? How done, and

with what effect? What another mode? How may fraud be practised to have this effect? Suppose original debtor's obligation may be avoided through fraud, what effect has that upon the surety? What illustrations? What another mode of extinguishment? Mistake as to what? What is the test of sufficiency of mistake? What another mode of extinguishment? What is the meaning of the term confusion? What the instances in which it may occur? What effect has the extinguishment by confusion of the principal debt? What of the accessory obligation?

## PART IV.

## RIGHTS OF THE CREDITOR AGAINST THE SURETY.

§ 390. The first thing necessary to secure the liability of the surety, is the *default* of the *principal debtor*. The debt must become due, and remain unpaid, to give the creditor the right of resorting to the surety. It must have been legal in its inception. Not only must the time for payment have arrived, but if any act remains to be done by the creditor to the debtor, before he could proceed against him, until that act is done, he has no right against the surety. A surety, for instance, engages that his principal shall, from time to time, *when required so to do by the creditor*, duly account for all moneys received by him, and pay over any balance that may be due from him. The creditor, before he has any claim against the surety, must require, and take the account. *Antrobus v. Davidson*, 3 *Merivale*, 578.

§ 391. The creditor is not only entitled to all the securities which have been given to him by the principal debtor, but he is also in equity further entitled to the benefit of all those which the principal debtor, by way of security, has given to his surety. A purchaser of land, for instance, procures a third person to give his note for the consideration money; and to indemnify him for such liability, executes to him his bond and mortgage on the premises; and before the note falls due, the maker of it fails. Held that the vendor of the land is entitled to the benefit of the bond and mortgage. *Vail v. Foster*, 4 *Comst.* 312.

§ 392. Where a principal debtor assigns his effects to trustees for the benefit of his creditors *pro-rata*, and owes a debt for a part of which a surety is responsible, and for a part of which he is not, the rule in the distribution of dividends is, to apply them ratably to the whole debt, including as well, the part to which the guaranty does, as that to which it does not extend. *Bardwell v. Lydall*, 7 *Bingh.* 489.

### QUESTIONS.

What is the first thing necessary to secure the liability of the surety? What must be the character of the debt? What, if any act remains to be done by the creditor to the debtor, before he could proceed against him? What illustration? What is the creditor in equity entitled to as to securities given to the surety? What illustration? Where a principal debtor assigns his effects to trustees, for the benefit of his creditors *pro-rata*, owing a debt, for a part of which a surety is responsible, and for a part of which he is not, what is the rule of distribution of dividends realized out of his effects?

### PART V.

#### RIGHTS OF THE SURETY AGAINST THE CREDITOR.

§ 393. The Roman civil law, in most respects the mother of our equity jurisprudence, and of the Louisiana Code, gave to the surety, as against the creditor, some very important rights, which the English common law has never conceded, and in relation to which courts of equity have proceeded with a very faltering step. One of these rights was termed that of *discussion*, and this related both to person and property. It gave to the surety the right when the debt fell due, of compelling the creditor first to seek his remedy against the principal debtor before resorting to him, and if any property had been pledged by the principal for the debt, of further compelling the creditor to exhaust his remedy against that, before he could be made liable. The common law fails to recognize either one of these rights. It allows the creditor to avail himself of all his securities to obtain the payment of his de-

mand. He may, if he chooses, proceed against all of them at the same time, but the moment he obtains satisfaction from one, that satisfies all, and he has no further claim upon any.

§ 394. The Court of Chancery, in England and in this country, has strongly desired to concede to the surety this right in both its aspects, and although it can hardly be said to have made a full concession of it, yet in several respects it has approached very nearly to it. In relation to the first, or discussion of the person, the case of *King v. Baldwin*, 17 *John*, 384, and two cases in Pennsylvania, one in 8 *Serg. & Rawle*, 116, and the other 15 *Serg. & Rawle*, 29, 30, go, perhaps, the furthest in settling the principle, and pretty plainly sustain the right of the surety, when the debt falls due, to compel the creditor to proceed against the principal to collect it, or if he declines, and the principal becomes insolvent, then to be exonerated from all liability.

As to the second, or discussion of the property, it seems conceded that where a creditor has a personal remedy against the surety, and also a fund to which he may resort for payment, but to which the surety cannot, equity will, upon the surety's indemnifying the creditor against the consequences of all risk, delay, and expense, compel the creditor first to apply the fund towards the satisfaction of his debt, before proceeding personally against the surety. *Wright v. Simson*, 6 *Vesey*, 714; *Wright v. Nutt*, 1 *H. Black*, 136 *Note*. So, also, if property belonging to the principal and property belonging to the surety be deposited with the creditor, as a security for his debt, the surety, on offering to pay the creditor what shall be found due to him upon account stated, may, in equity, insist upon the property of the principal being first applied in satisfaction of the creditor's debt. In this country the case of *Hayes v. Ward*, 4 *John. Chan.* 123, presents the fact of a creditor in New Jersey, where all the parties resided, taking from B, the holder of a promissory note, indorsed by the plaintiff, on a loan of money alleged to be usurious, a bond

and mortgage, which was ample security for the debt ; and instead of resorting to the bond and mortgage, or to the principal debtor, sued the plaintiff at law in the State of New York, while transiently passing through it. But, upon these facts, the Court of Chancery granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the bond and mortgage in New Jersey.

§ 395. Another right derived from the civil law, and incorporated into the equity jurisprudence of this country, is what is termed the *cession of actions*, or *subrogation* to all the rights of the creditor. This is a right which only accrues to the surety upon his satisfying the creditor's demand ; and entitles him, upon such satisfaction, to demand and receive from the creditor a cession of all his actions against the principal, the co-sureties, and all those, if any, holding pledges. The principle established is : that a surety, upon payment to the creditor of the debt of the principal, is, in equity, entitled to the benefit of all securities of which the creditor is possessed, and can render available against the principal debtor. It is immaterial whether he was aware of the existence of the securities, and became surety on the strength of them or not ; but they must have been deposited, assigned, or made chargeable in respect of the same transaction in which the surety became liable. This right of subrogation does not depend upon contract, but reposes upon general principles of justice and equity. *Mathews v. Aikin*, 1 *Comst.* 595. A surety by refusing to take the control of a judgment and execution against the principal debtor, when offered to him by the creditor, may deprive himself of the right to demand subrogation, when the debt is sought to be collected from him. *Hubbell v. Carpenter*, 1 *Seld.* 171. So very careful is this right of subrogation guarded by equity, and so fully protected, that where a creditor makes an agreement by which a security is rendered valueless to a surety who is entitled to be subrogated in respect thereto, the surety who has paid the creditor, after a judgment obtained

against him in ignorance of such agreement, is entitled to recover from the creditor the amount of the defeated security. *Chester v. The Bank of Kingston*, 16 *N. York*, 336.

### QUESTIONS.

What is meant by the right of discussion under the civil law? How is this regarded by the common law? How by a court of equity? What are the rights of the creditor under the common law? What right does equity allow as to discussing the person? What right as to discussing the property? Is there any case in which it has compelled the creditor to look first to the property pledged? What is another right allowed to the surety? Upon what is this allowed? What does it entitle him to do? What is the principle that is here settled? Is it necessary that the surety should have been aware of their existence, or become surety upon the strength of them? What are they limited to? What does this right depend upon? How may a surety deprive himself of it? What instance shows the care with which the Court of Chancery guards it?

### PART VI.

#### RIGHTS OF THE SURETY AGAINST THE PRINCIPAL.

§ 396. No right accrues to the surety against the principal until the default of the latter. However strongly he may be approaching to utter insolvency, and however necessary it may be to the surety to proceed immediately against him, in order to realize any thing upon his debt, yet he can, in no case, take any step until the debt becomes due, and the default of the principal debtor. Immediately upon that, the surety may discharge the debt, become subrogated to all the rights and securities of the creditor, and may, in addition, proceed at once against the principal to collect the debt. He then stands in the place of the creditor, and is not only entitled to all his rights, but has also acquired a right of his own to sue and recover for money paid for his, the principal's use. It is immaterial whether the surety voluntarily paid it, or was compelled to do so by legal proceedings. Nor is it essential that he have actually

paid the whole debt. If he has done that which is equivalent to it, and made a compromise, it is sufficient; but he can, in no case, recover beyond the sum actually paid, and interest thereon. If the surety has taken from the principal any security, he must, in proceeding against him, resort to the remedy adapted to the security. His right is to recover, not only the amount paid with interest, but also all costs and charges he may have been subjected to through the acts or default of the principal. If the surety has discharged a debt due from several debtors, and then demands the entire debt from one of them, he should cede to this debtor the actions he may have in his own right against the others, and also the actions of the creditor to whom he may have procured a subrogation.

#### QUESTIONS.

When does the right of the surety against the principal occur? What may he do immediately upon default of the principal debtor? In whose place does he stand? What right of his own has he acquired? Is there any difference whether the payment is voluntary, or compulsory? Is it essential that the whole debt should be paid? How is it in case of compromise? What amount can he recover? What kind of remedy must surety adopt, if he has taken security? What amount can he recover? Suppose the surety has discharged the debt due from several debtors, and then demands the entire debt from one, what must he do?

#### PART VII.

##### RIGHTS OF THE SURETIES AGAINST EACH OTHER.

§ 397. The creditor, availing himself of his rights at law, collects the entire debt of one of the co-sureties, there being several of them who have guaranteed its payment. The inquiry now is:—what is the right of that surety as against his co-sureties who were equally bound with him for the payment. It will be at once perceived that the co-sureties have no contract with each other. Their contract is with the creditor only, and with him each has made the same contract. One has been compelled to pay, but it is only upon the contract between him and the credi-



tor. What right does that give him as against others who had entered into a similar contract, but have paid nothing? Clearly no right based upon any privity of contract, because there is none. The next inquiry is, whether, in the absence of such a right, equity has any resources by which it can administer any relief. And the answer is that it has. It derives its principle of interference from the fact that payment of a common debt, for which all were equally liable, having been made by one, it will equalize the burden, and compel the others to bear their just proportion of the loss. And this remedy in our jurisprudence is not confined to the Court of Chancery. The law, following equity, also gives the right of contribution between co-sureties, whether they are made such by the same or separate instruments. Neither is a surety any the less entitled to this contribution, because at the time he became such, he was ignorant that he had any co-sureties.

§ 398. This was not only originally a matter of equity cognizance, but there are several advantages in pursuing the remedy in equity. In the first place, if the surety requires any discovery to be made, either as to the persons who are his co-sureties, or the instruments by which they become such, or the amount or contents of the instruments, facilities much superior are afforded in equity. Another instance where equity is necessary to be invoked, is where the sureties are each bound in penalties that are distinct and several. Again, the law can only recover an equal proportion from each co-surety. It can take no notice of the insolvency, or utter inability of one or more of them to pay his or their proportions. Suppose there are four sureties, it can enable a recovery of one-fourth against each. But two of them are insolvent, and can pay nothing. The law can still only give one-fourth against the only remaining solvent one, so that, in that case, one would have to bear only one-fourth, and the other three-fourths, of the loss. The Court of Chancery, by its power of specializing, and

administering specific remedies, can apportion the burden among those who have the ability to bear it, and thus in the case proposed, would decree that the solvent surety, instead of paying a fourth, should pay one-half the debt.

§ 399. In equity, although the sureties become such by several distinct instruments, yet, if it be for the payment of the same sum of money, and one pays more than an equal share of that sum, he may compel contribution from his co-sureties; but if the agreement be that each shall assume a liability for only a given portion of one sum of money, no such right of contribution among them can be enforced. And the same principle prevails when the sureties are bound by different instruments for equal portions of a debt due from the same principal, but the suretyship of each is a separate and distinct transaction.

§ 400. One surety cannot resort to his co-sureties for contribution, unless he has paid more than his ratable portion of the debt for which they were bound in common; and where a creditor compounds with one of four sureties, and receives a dividend upon the insolvency of another, the other two must have paid more than half of the debt before they could call upon the others for contribution.

§ 401. A surety is not entitled to recover from his co-sureties, interest on the money paid by him, although the debt he paid was bearing interest. Nor is he entitled to contribution for the costs of defending an action brought against him by the creditor. The reason of this must be found in the want of all privity of contract between the co-sureties. Neither can be said to pay money or defend a suit at the request of the others. The principle has even been carried so far as to deny the recovery of costs for defending an action, where the party sought to be made liable had executed to the plaintiff a bond of indemnity. *Gillett v. Rippon*, 1 *Moody & Malkin*, 406.

§ 402. Two sureties are required to be furnished for the proper performance of his duties by a public officer. A

and B are such sureties, but before they become such, A agrees verbally with B, that, in consideration of his becoming a co-surety with him, he will guarantee him against all loss and damage resulting therefrom. The officer becomes a defaulter to a large amount, and the sureties consequently made liable. Two questions arise here. Can B, by parol evidence, show the contract existing between him and A, and if so, is the undertaking of A, which is thus shown, within the statute of frauds, so as to protect him from the effect of his guaranty. Both these points have recently arisen, and been decided in *Barry v. Ransom*, 2 Kern. 462, in which it was held that parol evidence was admissible to ascertain the relations between the sureties, and that the verbal indemnity given by one was not within the statute of frauds. The latter was deemed the more difficult question, and was so held because of the liability of the guarantor to pay the debt against which he indemnified. It was in truth a guaranty founded upon his own liability. But the doctrine seems to be admitted here, as had before been settled in the Supreme Court, that where one party indemnifies another for becoming liable for the debt or default of a third party, such an indemnity is within the statute of frauds, and therefore required to be in writing. *Kingsley v. Balcom*, 4 Barb. 131.

#### QUESTIONS.

Upon what principle is one surety allowed to recover contribution of the co-sureties? What does the law do in this respect? Suppose the surety was, at the time, ignorant that he had co-sureties? How many advantages are there in favor of pursuing the remedy in equity rather than at law? What is the first? The second? The third? What is the rule where there are distinct instruments but for the payment of the same sum of money? What where each assumes a liability for only a given portion of the same sum of money? What, where each is bound by different instruments, each being a separate and distinct transaction? What must the surety do before he can resort to his co-sureties for contribution? What the right of recovering of the co-

sureties interest and costs? What in case of indemnity? What the right to introduce parol evidence to ascertain the relations of the sureties with each other? Does one surety, indemnifying another, come within the statute of frauds? Does one person, indemnifying another for assuming a liability for a third, come within the statute? What is the difference between the two cases?

## BOOK III.

### R I G H T S .

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#### SECOND DIVISION—RIGHTS RELATING TO THE THING.

Under this division, there are four classes of rights, derived from four different species of contract, all having relation to the thing, or personal property. Of these we have,

1. The contract of *affreightment*, which relates to the carriage and transportation of property, and the letting or leasing of ships or vessels for that purpose.

2. The contract of *bailment*, which relates to its delivery to others upon certain trusts to be exercised about it.

3. The contract of *insurance*, which is an indemnity for its loss, and,

4. The contract of *sale*, and *assignment*, which makes of it an ultimate disposition.

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### CHAPTER I.

#### CONTRACT OF AFFREIGHTMENT.

This has, for its general object, the carriage or transportation of property, and incidental to this, the leasing or hiring of ships, or other vessels, for that purpose. It also embraces the carriage and delivery of goods; the power

and authority of the master; the rights and duties of the merchant; and the consideration of general average and salvage. It will, therefore, include every thing relating to the transportation of property, except the peculiar duties, liabilities, and rights of the *common carrier*, which will be considered in the next chapter. The contract of affreightment itself has a twofold aspect, the one relating to the vessel in which the goods are to be conveyed, and the other to the goods themselves which are the subject-matter of conveyance. The first of these gives us the *charter-party*, the second the *bill of lading*.

## PART I.

### THE CHARTER-PARTY.

§ 403. The *charter-party* is a written contract of affreightment, by which an entire ship, or some part or portion of it, is let to a merchant for the conveyance of goods, on a particular voyage, in consideration of the payment of freight. We have here, as parties, the ship-owner, who stands responsible for the ship, and the merchant, who seeks to employ it in the transportation of his goods in consideration of the freight which he pays for its use. There is frequently, however, a middle man, the carrier,—who hires the ship of the owner, and receives the goods of the merchant, and who sustains, therefore, relations to both parties. So, not unfrequently, the owner of the vessel runs it himself, thus assuming all the duties of the carrier in relation to the goods he transports. The carrier, or merchant, who thus becomes the lessee of the vessel for the voyage, is termed the charterer.

§ 404. The charter-party ordinarily contains: 1st. The names of the parties, and of the ship or vessel. 2d. A description of the voyage to be performed. 3d. The covenants, on the part of the owner, of the good condition and seaworthiness of the vessel, and the promptness and dispatch

with which she shall receive the cargo and perform the voyage. 4th. The excepted perils, for which the shipowner does not mean to hold himself responsible, and against which he does not intend to insure. These are usually acts of God, or public enemies, detentions and restraints of kings, princes, rulers and republics, fire, the dangers and accidents of the seas, rivers, and navigation, and all other unavoidable dangers and accidents. 5th. The covenants on the part of the charterer to load and unload within a given time, usually specifying an allowance of so many lay, or running, days for loading and unloading the cargo, providing for the rate and payment of the freight, and also the rate of demurrage beyond the specified time. This latter term is employed to express the allowance or compensation for the delay or detention of the vessel; and is often, although not necessarily, a matter of contract. The coast and inland commerce of the country which is conducted through the agency of sloops, steam-boats, and canal boats, on our rivers, lakes, and canals, is, to a large extent, carried on under season contracts, by which the owner covenants to run, through the season, or such part of it as he may specify, his vessel between such and such ports and places; to receive, safely transport and deliver, wherever the bills of lading may require, all such goods and chattels of the merchant as are specified, or all that may be offered with certain exceptions; the merchant, on his part, covenanting to lade and freight the vessel during the season, commencing at such a time, and continuing to such a time, paying as freight for the same, at the times specified, at and after the several rates, which are also particularly specified.

§ 405. This species of contract admits, of course, of very great variety. It is not essential to constitute it that the ship or vessel, as in the cases supposed, should be exclusively chartered. That occurs usually where commerce is carried on in its most extensive forms, both foreign and inland. Besides the *chartered*, there is what is termed the

*general* ship or vessel. This is one which is open for the use of merchants generally, in which any number, who are totally unconnected with each other, may contract upon the best terms they are able, for the transportation of their merchandise.

§ 406. The contract, once entered into, controls the rights of the parties. Its stipulations must be strictly performed on both sides. One illustration of this is found in the case of *Glaholm v. Hays*, 2 *M. & Gran.* 257, in which the phraseology "*to sail on, or before, a given day*," was held equivalent to the words "*conditioned to sail*," and hence formed a condition precedent, the omission to perform which, would have the effect of discharging the other party. The question, which, perhaps, most frequently arises, relates to the claim for *demurrage* which, among the great multitude of occasions for delay, often arises for adjustment. Any delay beyond the arranged period will subject the merchant, or party-chartering to its payment, although it may arise from the crowded state of the docks, or from some unforeseen impediment, not at all attributable to his fault; or if he has not been apprised of the ship's arrival, or the bill of lading has not come to his hands, none of these furnish sufficient reason to excuse his engagement. It must, however, be a delay for the purpose of loading or unloading, and hence where the detention was occasioned by ice, which prevented her from sailing after being loaded, the demurrage was held not to be payable. *Pringle v. Mollet*, 6 *M. & W.* 80. The same principle prevails where the owners interrupted the unloading by their wrongful interference. So a delay in starting by tempestuous weather will not be chargeable upon the charterer. Where a certain number of days are allowed for unloading, they are to be reckoned from the vessel's arrival at the usual place of discharging its cargo, and not at the entrance of the port. Where a certain number of days are allowed for such purpose, the merchant is entitled to the whole of the time,



and subjects himself to no cause of action for declining a previous offer of them, provided they are unloaded within the time.

§ 407. The duty of the owner is not limited to duly preparing and equipping the vessel for the voyage; but he is also bound to keep her in good condition, and fully equipped throughout its continuance. Any considerable failure on his part would exonerate the merchant from his obligations under the contract. If either party is not ready by the time appointed for loading the ship, the other should look elsewhere for his ship or cargo, for he can only hold the defaulting party responsible for such damages as he could not, by reasonable efforts, have prevented. Where the ship is hired exclusively for the voyage, and only a part of the cargo is put on board, the charterer is liable for what the vessel could have taken, had a full cargo been furnished. *Duffie v. Haynes*, 15 *John*. 327.

§ 408. If the charter-party is silent as to the condition of the vessel, there is always an implied warranty that the ship is sufficient for the voyage, and hence should there be a latent defect, unknown to the owner and undiscoverable upon examination, the owner must answer for the damage which has been occasioned by it. Like the common carrier, he is regarded as an insurer against every thing but the excepted perils. His general liability is very similar to that of the common carrier, as he is made answerable for all losses other than what arise from the excepted cases of the act of God and the public enemy. His responsibility begins with the delivery on board the ship. He must see that they are properly stowed in a manner usual with such goods.

§ 409. It sometimes becomes important to determine who, under the provisions of the charter-party, is the owner of the ship; whether the possession of the ship passes to the merchant, so as to constitute him, for the time, the owner; and thus to entitle him to the lien for freight. The

means of solving this question, must be gathered from the terms of the instrument, or from its purpose and object. A charterer will be considered as owner for the voyage, who not only hires the ship during its continuance, but has exclusively its possession, command, and navigation. But where the general owner retains the possession, command, or navigation of the ship, and contracts to carry a cargo for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the charterer is not clothed with the character or legal responsibility of owner-ship. *Howe v. Groverman*, 1 *Cranch*, 214. The true test is whether the charterer is responsible for the conduct of the master and mariners during the voyage. If so, he must be considered as occupying the position of owner.

#### QUESTIONS.

How many classes of rights are in this division? Derived from how many different species of contract? What contracts, and relating to what? What has the contract of affreightment for its general object? What does it embrace? What is included under it? What double aspect has the contract of affreightment? What is a charter-party? Whom have we here as parties? Who may be a middle man between the two? Who is the lessee of the vessel termed? What does the charter-party ordinarily contain? What is the meaning of the term demurrage? How is commerce on our inland waters carried on? By what species of contract? Is it essential that the ship or vessel should be exclusively chartered? What occurs in the case of the *general* ship or vessel? How is the contract construed? What illustration? What question the most frequently arising? What does a delay beyond the arranged period subject to? What must it be a delay for the purpose of? How when occasioned by ice? When by tempestuous weather? When are days allowed for unloading reckoned from? When a certain time allowed for unloading, what is the merchant entitled to? What does the duty of the owner extend to? What would failure on his part do? What if either party is not ready at the time appointed for loading the ship? What is the liability of the charterer where the ship is hired for the voyage, and only a part of the cargo furnished? When charter-party is silent as to the condition of the vessel, what is the implied warranty? What if damage results from a latent defect? How is the

owner regarded? What is his liability similar to? What answerable for? When does his responsibility begin? What must he see to as to storage? What question as to ownership sometimes necessary to be determined, and why? What are the means of solving this question? In which of the two cases supposed is the charterer considered the owner, and in which not? What is the true test of ownership?

## PART II.

## THE BILL OF LADING.

§ 410. Shipped, in good order, by A B, merchant, in J. K. } and upon the good ship called the —, whereof No. 1. } C D is master, now being in the harbor of New York and bound for Liverpool, England, 20 bales, containing 100 pieces of broadcloth, marked and numbered as per margin, and are to be delivered in the like good order and condition, at Liverpool aforesaid; (the act of God, the public enemy, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted,) unto E F, merchant there, or his assigns, he or they paying freight for the said goods, — per piece, freight, with primage and average accustomed. In witness whereof, the master or purser of the said ship, hath affirmed to three bills of lading of this tenor and date; one of which bills being accomplished, the other two stand void.

Dated at New York, the  
day of ——— ———.

The bill of lading, of which the above is a copy, has relation, it will be perceived, solely to the conveyance of the cargo, while the charter-party contracts for the hire of the ship. It is signed by the master as agent for the ship-owner or charterer, and answers the double purpose of a receipt of the goods, and an agreement to carry them to their place of destination. As a receipt it may, as between the original parties, be varied and explained by parol. It will be seen that three bills of lading are made out and signed. One of

these is for the freighter, another for the consignee, factor, or agent abroad, and a third usually kept by the master for his own use. The whole make but one contract as to the master and owners. It may happen that different parts are indorsed to different persons, and in that case a competition may arise as to the goods. The rule here generally is that where the equities are equal, the property passes by the bill first indorsed.

§ 411. The most peculiar feature noticeable about a bill of lading is its negotiability, or rather the form of it; for the question as to whether it is really negotiable so as to transfer a perfect title to the indorsee in the same sense in which the title, and rights incident thereto, become transferred to the indorsee by the indorsement by the proper party, of a bill of exchange; or whether such indorsement operates merely as an assignment, giving to the assignee the right simply to the possession of the goods, subject to the real rights of parties, is one of the most difficult known to the law, and one that can hardly yet be deemed fully settled. *Lickbarrow v. Mason*, 2 T. R. 63. 1 H. Black. 357. Note in *Newsom v. Thornton*, 6 East, 17. Chancellor Kent, 2 *Kent's Com.* 549, considers the understanding of the law at Westminster Hall to be that the quality is strictly negotiable, and that a title free, and discharged of all equities, is transmitted to the *bona fide* indorsee for value. But in American editions of 1 *Smith's Leading Cases*, 751, in a note to *Lickbarrow v. Mason*, it is attempted to be shown by an analysis of the adjudged cases, that the possession of the bill of lading can clothe the holder with no greater powers than would result from the actual possession of the goods. That it does not constitute title in itself, and merely, therefore, assigns whatever interest the consignor might have in the goods. This may, under all the circumstances, still be regarded as an open question.

§ 412. There is no doubt, however, but that the negotiable or assignable quality of the bill of lading will enable

the consignor to control the direction which the goods shall take. And hence, if the bill provide for the delivery to "A for the use of B," the purpose being to secure a debt due from the consignor to B, the assent of the latter will be presumed, and the property will pass at once to B, and cannot be attached for a debt of the consignor. *Grove v. Brien*, 8 *How. S. C.* 429. And this power of transferring property by means of the assignable quality of the bill of lading, will remain to the consignor as long as the goods are in the hands of any agent of his, and he may alter their destination while on board; so that, if the master sign a bill of lading for the delivery of goods to A, or his assigns, and the consignor afterwards transmits a bill of lading to B, making them deliverable to him, B will be entitled to them, if nothing further had been done to vest the property in A. *Mitchell v. Ede*, 11 *Adol. & Ellis*, 888. The consignment may also be made subject to any condition that the consignor may choose to insert, and then, if received, it must be subject to the condition. Under the bill of lading, the goods go into the possession of the master or ship-owner, who thenceforward becomes a common carrier of the goods, subject to the exceptions embraced in the bill, until their delivery to the consignee.

#### QUESTIONS.

What does a bill of lading have relation to? What the charter-party? By whom is the bill of lading signed? What purpose does it answer? How, as a receipt, may it be varied or explained? How many bills of lading are made out and signed? For whom is each one? What do the whole make out? What is the rule when different parts are delivered to different persons? What is the most peculiar feature noticeable about the bill of lading? Which is it, negotiable or assignable? By what means is the consignor enabled to control the direction which the goods shall take? What illustration? How long will the power of controlling property remain with the consignor? What, if the consignment be made subject to a condition? Where do the goods go under the bill of lading, and subject to what, and with what exception?

## PART III.

## CARRIAGE AND DELIVERY OF GOODS.

The last part leaves the goods in the hands of the common carrier for transportation. Next, therefore, in order, follow his duties in relation to the carriage and delivery of the goods, and the heavy responsibilities he places himself under. But as this forms a very important branch of the law, we shall defer it to that connection in which it generally comes up for consideration.

## PART IV.

## POWER AND AUTHORITY OF THE MASTER, IN REFERENCE TO MARITIME LOANS.

§ 412, *a*. The heavy weight of responsibility under which the common carrier acts, and the many unforeseen hazards attending the movements of commerce, have led to the necessity of maritime loans, and the power and authority vested in the master in reference to them. The character of these loans, the securities upon which they rest, and the power and authority involved in their creation, as well as the mode of their enforcement, are all peculiar, and have grown out of the necessities of commerce. The master of a vessel meets with a disaster, by which an unforeseen demand is made upon him for money to enable him to make repairs and complete his voyage. He arrives at a port where there is money, but no knowledge on the part of any one there of the responsibility of the master or owners of the vessel. But there is the vessel, its accruing freight, and its cargo, all within the view of the capitalist. But neither of these belongs to the master, who is the mere agent of the owners, and ordinarily, according to the principles of the common law, he could give to others no rights as to either. But a higher law here interposes, and permits him, with a view to the safety of his ship and cargo, to pledge, for the

necessary funds, the vessel, and freight, and, if necessary, even the cargo. This is done upon what are termed bottomry and respondentia bonds. If the loan be made upon the vessel and accruing freight, it is termed *bottomry*, if upon the cargo, *respondentia bonds*. The object, and most of the principles governing both, are the same.

§ 412, *b*. The substance of the contract in the case of the *bottomry bond* is that, in consideration of a certain sum of money advanced for the use of the ship, the borrower undertakes to repay the same with a stipulated rate of interest, provided the ship shall terminate her voyage successfully; and for the performance of the contract, he binds or hypothecates the keel, or *bottom* of the ship, and hence the origin of the term *bottomry*. This may be in the form of a deed, called a bottomry bill, but more generally it is in that of a bond. But in whatever form, the contract should be clearly stated,—the amount loaned, the interest to be paid, usually far beyond the legal rate of interest; the condition upon which repayment, both of principal and interest, depends; the safe arrival of the vessel at the termination of the voyage; and the number of days within which the same shall be paid after such arrival. It will be seen from this, that the lender takes the entire risk of the voyage. The fact that not only the interest, but the capital also, is put in jeopardy, removes it from the taint of usury, and thus avoids all objection from that source. There are no technical terms required in the formation of this contract. The tersest mercantile phraseology may be employed. The words

“I bind myself, my ship and tackle, to pay the sum borrowed, with twelve per cent. bottomry premium, in eight days after my arrival at the port of London,” were held sufficient; the words “my arrival,” being construed by the court to mean the ship’s arrival. *Simonds v. Hodgson*, 3 B. & Ad. 50. The bond usually specifies the risks which

the lender is to run, and these are essentially the same as those against which the insurer indemnifies.

§ 413. The condition of repayment is the safe arrival of the vessel. This suggests the question as to the character of loss which can have the effect of exonerating. And here there is no such thing as a constructive total loss. Nothing short of utter annihilation will discharge the borrower. If any portion of the vessel be saved, it continues subject to the hypothecation, and to that only can the lender look for his indemnity. The bottomry bond is really a mortgage, by which the master pledges the ship as security for the money borrowed, covering also the freight,—the ship's earnings,—during the time limited. On the safe arrival of the ship, or of any part of it, if the sum borrowed and interest be not paid within the stipulated time, the lender applies to the Court of Admiralty, in which such proceedings may be had, as that a decree of sale may be obtained, the proceeds of which are divided among the respective claimants as justice shall dictate. And if there are several successive bottomry bonds, the ordinary principles that govern successive liens are reversed, and instead of being the first that is preferred in the payment, it is the last, and the discharge is in the inverse order in which they are given. The principle which gives origin to this rule, is derived from the equity of the case. It is the last loan that enables the vessel to reach the port in safety, and but for it all the previous ones would be lost. As that, therefore, is really the means of securing the payment of the others, there is a clear equity in allowing it the precedence in payment. One condition, however, is essential to be made out, and that is, that the last loan was *necessary* to enable the vessel to continue and complete its course.

§ 414. A question may here arise as to the rights of the lender where the ship or cargo is lost through the default of the master. The loss does not then fall within the perils which are at the risk of the lender. That is not, therefore,



a hazard which he assumes. As the loss occurs through the ignorance or misconduct of the master, the lender is entitled to the legal presumption, that but for that, the vessel would have reached the port in safety. Such a loss, therefore, works a forfeiture of the bond, which must accordingly be paid, although the lender now has only the personal security of the master and owners to rely upon. So also if the ship be lost on the voyage, and the cargo forwarded by another ship, the lender is entitled to payment, as the contract, in its spirit, has then been performed.

§ 415. It is essential to the very nature of this contract that there be risk and hazard, and also that the ground and reason of the loan should be necessity. "*Necessity*," says Lord Stowell, "is the vital principle of hypothecation, and the Court of Admiralty will consider every circumstance, will go into the whole history of the voyage, in order to determine whether there be that necessity, without which an instrument of hypothecation is void." After the hazard has once been incurred, the condition is satisfied. The voyage once commenced after the completion of the loan, although the vessel be forced back by the perils of the sea into the port of departure, and the voyage be finally abandoned, yet is the lender entitled to his principal and interest, for the whole has been subject to hazard. The bond depends exclusively upon the security of the ship, and cannot be made to cover advances upon the personal security of the borrower. But it constitutes the first lien upon the ship; and although there may have been a mortgage or a prior lien of any other description upon it, yet this supersedes all others, and is to be first satisfied; and this, it is obvious, must be so, or the lender could never have any safety in making his advances.

§ 416. It has been made a question whether as the motive to make the loan may be supposed to have ceased upon the departure of the ship, a loan of this description can be good if made after the ship's departure, and while at sea; but it

seems now to be generally understood in this country that such loan is good, if made after the ship has departed, and the goods are at risk. The lender assumes no hazard as to the application of the money. The master may wholly misapply it, without affecting the rights of the lender. The latter has only to convince himself of the necessity of the loan, and to take the appropriate risks. He has nothing to do with the use made of the money after he has loaned it.

§ 417. The master of the vessel has the undoubted power and authority to make this loan, but only under certain circumstances. It must be in the absence of the owner, after the vessel has started from its port, and has reached some foreign port, where the owner does not reside. The law, however, does not render it necessary that the ship or cargo should be in a foreign port. A loan of this character, made in a port of the same country where the owner resides, is good, if it arise from necessity, and there be no ready means of communication with such owner. He has no right to hypothecate for a pre-existing debt, and the necessity of the loan must be shown to have existed at the time it was made, and that the master had no other resource for raising the money.

#### QUESTIONS.

On what are maritime loans, and the power and authority of the master, grounded? What have they grown out of? Under what circumstances are they justifiable? What is a bottomry bond made upon? What a respondentia? What is the substance of the contract in a bottomry bond? In what form may the contract be? What is the condition upon which the repayment depends? Who takes the risk of the voyage? What removes the contract from the taint of usury? What may not, and what may, be employed in the formation of the contract? What does the bond usually specify? And what are these risks? What kind, or extent of loss, will excuse repayment? What, if any portion of the vessel be saved? What is the bottomry bond in substance? What does it do? What, and where is the remedy? What is the rule, where there are several successive bottomry bonds? Why is the general rule reversed in this case? What condition necessary to give lien to the last bond? What is the rule where the loss occurs through default of

the master? What effect does such a loss work upon the bond? How is it if ship be lost, and cargo forwarded by another? What is the ground of all risk and hazard? When is the condition satisfied? How is it if the vessel is forced back, and voyage abandoned? What does the bond depend upon? What kind of lien does it constitute? Is a maritime loan good, if made at sea? Does the lender assume any hazard as to application of the money? Suppose the master misapplies it? Of what has the lender to convince himself? Under what circumstances has the master power and authority to make this loan? How as to presence of owner? Can it be made in a port other than a foreign one? What must be shown at the time to justify the loan?

## PART V.

## DUTIES OF THE MERCHANT.

§ 418. The duties of the merchant relate to the full and perfect performance of what he has undertaken by his contract. He must lade the ship within the stipulated time, and if no time be stipulated, within a reasonable time. It must be with the stipulated cargo; and he must put on board no contraband goods, or those of any description that will work a forfeiture. A failure in any of these respects will subject him to the damages incurred. He must also pay the charges due on his commodities. Of these, by far the most important is the payment of freight; but this will be more appropriately considered in connection with the law of common carriers.

## PART VI.

## GENERAL AVERAGE.

§ 419. Independent of the freight, there are some other charges of small amount which the merchant is called upon to pay, and which are usually provided for in the bill of lading. Such is *primage*, which is a small customary payment to the master for his care and trouble. So also *demurrage*, which has already been considered; and *average*, by which is meant several petty charges, such as towage, beaconage, &c. But another charge, of much more importance

to consider, and which, like contracts of bottomry and respondentia, grows out of the peculiarity of commercial navigation, is what is termed *general average*. This means the contribution which the property saved is called upon to make, in order to pay for the loss of other property which has been voluntarily sacrificed in order to save the remainder. The simplest case is that of a storm at sea too severe for a heavily laden vessel to weather. The obvious resource of the captain, or the master in command, is to lighten the vessel by throwing overboard the less expensive and more ponderous merchandise, and by that means to enable it to outride the tempest, with as large a part of her cargo as possible. The owners of that portion of the cargo which was sacrificed to secure the safety of the rest, had an equal right with the others to have it transported to its place of destination, and there to realize its proceeds. There is therefore no reason why they should be called upon to suffer the entire loss, while the others, whose property was saved at its expense, should suffer nothing. There arises, therefore, from the very nature of the case, an obvious equity, out of which has grown the legal rule, that all the property saved, shall contribute to all losses voluntarily incurred to save it from a like destruction.

§ 420. The first inquiry that naturally presents itself here, is to ascertain the cases in which the law will enforce general average. And here, although the principle is a plain one, and, it should seem, ought to present no real difficulties, yet many do occur in its application. In the first place, it is limited to such voluntary sacrifices as secure the safety of ship or cargo, or a portion of it, and has no application where any loss of life has been prevented by the sacrifice. It is the voluntary sacrifice of property, to save other property, that can alone bring it within the principle.

§ 421. But the cases in which property has been sacrificed to save other property, seem somewhat conflicting as to whether they do, or do not, come within the principle. A

ship is injured by a peril of the seas, and compelled to go into port to refit. Are the wages and provisions of the crew, during the detention, such losses as require contribution by general average? In New York and Massachusetts they are; in England they are not. So it has been held that the wages and provisions of the crew, during capture and detention for adjudication, are a proper subject for general average; while in the case of a vessel detained by an embargo, they are not so subject, but are chargeable exclusively upon the freight. The cost of repairs which benefit the ship alone, and would have been unnecessary in the port in which they were made, do not come within the principle; but if they are incurred for the benefit of the cargo, and to save that, they come within the principle.

§ 422. The principle embraces every voluntary sacrifice or surrender to save property. Where a part of the cargo is voluntarily delivered up to a pirate or an enemy, as a ransom or contribution to save the vessel and residue of the goods, that which is saved must contribute to such loss. So also masts, cables, and other equipments which are cut away to save the vessel in a case of extremity, are to be contributed for by general average; but if the masts and sails are destroyed as a consequence of carrying an unusual press of canvass, they are not the subjects of such contribution, although they were cut away and abandoned for the preservation of the ship. This principle does not limit to the actual loss or injury of the subject-matter, as to which the contribution is claimed, but embraces also such expenses as are incurred in and about it for the common good, as the unloading the cargo in order to repair the ship. The voluntary stranding of the ship to escape tempests, or the pursuit of an enemy, has always been held to entitle to general average where the ship was subsequently recovered, and performed her voyage. But there has been a conflict as to such right when the ship was lost. In this country, however, the preservation of the cargo in such case entitles to con-

tribution. *Columbian Ins. Company v. Ashby*, 13 *Peters*, 331.

§ 423. The loss which it is thus proposed to compensate must not have been accidental, or the result of natural causes. The casting overboard and loss must have proceeded from no such sudden impulse as to exclude the exercise of judgment and will. In all cases where it is possible, a consultation should be had. Where the peril is imminent, that may not be possible, but a deliberate act of the will is still rendered necessary. This is evidenced, and required to be so, by the kind and character of the property sacrificed. The first abandoned must be those things that are the least necessary, the heaviest, and of the lowest value. The approach must be gradual, and only as the necessity increases, to the abandonment of articles of great value.

§ 424. This suggests another subject of inquiry, and that is, what goods are liable to contribution, and in what proportions. The general rule is that *all merchandise* of every description is thus liable. As the safety obtained thereby is the ground of the contribution, bullion and jewels, which are on board as merchandise, are not exempt. The rule subjects to contribution those articles that pay freight, and limits it to freight-paying, making articles contribute according to their value, and not their weight. Instruments of defence and provisions, as they are necessary to all, do not ordinarily contribute; but if they are sacrificed for the common safety, they are to be paid for by contribution. The wages of seamen contribute only to the ransom of the ship. The principle of voluntary loss for the purpose of saving, applies also to the case where a part of the cargo is sold for the necessities of the ship; as this is a sacrifice for a similar purpose as the case of an abandonment; and if the ship be afterwards lost, the goods saved must contribute towards the loss of the goods sold, the same as if they had been thrown overboard.

§ 425. One more inquiry under this head remains, and

that relates to the mode of adjusting the average. What property is to contribute, and at what price? The practice is to make and state an account of the articles that are to contribute, in which the property sacrificed is also included, because otherwise its owners would receive its full value without paying any thing towards the loss. Another account is then made of the losses which are to be replaced. The valuation adopted in both these accounts is the clear net price which they would have yielded, after deducting freight, at the port of discharge. The average is commonly adjusted by the brokers, and if insured, is paid by the insurers of the different parties chargeable. The ship owners contribute according to her value at the end of the voyage, and according to the net amount of the freight and earnings. When the vessel is lost, and is to be replaced by contribution, her value is estimated at her port of departure, allowing for the wear and tear up to the time of the loss. It is the duty of the master to have an adjustment made at the port of destination upon arrival, and he has a lien upon the cargo to enforce the payment of the contribution. *Strong v. The New York Firemen Insurance Company*, 11 John. 323.

#### QUESTIONS.

What do the duties of the merchant relate to? What must he do? What does a failure subject him to? What must he pay? What besides freight? What is meant by *general average*? What is the simplest case presented? What is the equitable rule arising from it? To what cases is the rule requiring general average limited? What is it that brings a case within the principle? Are the wages and provisions of the crew, while refitting, subject to average? Are they so subject while captured and detained for adjudication? What the rule while detained for an embargo? How is it with the cost of repairs? When do they, and when do they not, come within the principle? What does the principle embrace? What the rule, where a part of the cargo is voluntarily given up to a pirate or enemy as a ransom? What, when masts, cables, &c., are cut away to save the vessel? What, when destroyed by carrying too much canvass? Does the principle extend beyond loss or injury to subject-matter? And embraces what besides? What rule where the ship

is voluntarily stranded without being lost? What, where stranded and lost? What must not the loss be occasioned by? What, if it proceed from sudden impulse excluding judgment and will? When should consultation be first had? What is necessary? By what is this evidenced, and required to be so? What species of property first abandoned? How must the approach be to articles of value? What goods are liable to contribution? What is the ground of contribution? When do bullion and jewels contribute? What kind of articles are subject to contribution? What limitation is there? Do instruments of defence and provisions contribute? How, if sacrificed for the common safety? To what do seamen's wages contribute? What is the rule where a part of the cargo is sold for the necessities of the ship? And how if ship be afterwards lost? What proceedings in adjusting the general average? What is included in the statement of the property that is to contribute? What other account is necessary? What valuation is to be adopted? By whom is the average adjusted, and by whom paid? What valuation is attached to ship? What is the duty of the master? And his right?

## PART VII.

### SALVAGE.

§ 426. Another peculiarity which has grown out of commercial pursuits, is the law of salvage. This term expresses the compensation to be made by the ship owner or merchant, to other persons by whose assistance the ship or its lading may be saved from impending peril, or recovered after actual loss. This applies equally to rescues, whether they be of ship or cargo from the perils of the sea, or from the hands of enemies. In cases of goods derelict at sea, or captured, the ship or cargo, one or both must be in imminent peril. The salvors, a class of men often devoted to that kind of business, volunteer their efforts to rescue the property. If unsuccessful, they receive no compensation, as the rendition of their service is without request, and hence imposes on no one the obligation of payment. But if successful, the policy of the law permits him to look for his indemnity to the property rescued, or to its owners who receive the benefit, and who would have sustained the loss if their efforts had not intervened to prevent it. When the



salvage occurs of goods wrecked, that is thrown by the sea upon the land, the rights of the salvors and the proceedings in the State of New York, and in some of the other States, are regulated by statute ; but when the peril occurs at sea, and the goods are what is termed *derelict*, it is then a matter of admiralty or maritime jurisdiction, and is subject to maritime law. That jurisdiction, however, embraces all rivers navigable from the ocean, as far as their waters are affected by the tidal movements. And hence, where a part of the contents of a canal boat sunk in the channel of the Hudson River, where the tide ebbed and flowed, was rescued by salvors who claimed a lien upon it for their services, it was held that this came under the general principle of goods *derelict* at sea, and that the salvor had a lien for his salvage. *Baker v. Hoag*, 3 *Seld.* 555.

§ 427. The amount of the salvage, where it is not regulated by statute, is left to the discretion of the Court of Admiralty under the circumstances of the case. The amount varies according to the labor and peril incurred by the salvors ; their meritorious conduct ; the value of the ship and cargo, and the peril from which they were rescued. The most usual rate of allowance has been one-third of the property ; but sometimes one-fourth, and then again one-half the gross or net proceeds of the property saved have been adjudged to the salvor. The object is not only to reward meritorious service, but also to incite to strong efforts in such cases.

§ 428. In regard to the persons who are entitled to become salvors : the rule of exclusion is that so long as a person, whether seaman, officer, pilot, or other person, is acting within the line of his duty in the given case, he can have no valid claim for salvage remuneration. He is then hired and paid for his services, and there is no consideration for any thing extra he can render. A salvor, therefore, is a person, who, without any particular relation to the ship or cargo saved, tenders useful service, and renders it without

any pre-existing contract making such service a duty. This would exclude the master, pilot, passengers, seamen, and all such, whose services rendered may be fairly considered as due to the service in which they are employed. But a passenger, or an officer, acting as such, for extraordinary exertions beyond what his duty demands, may become entitled to salvage. But such an abandonment of the ship as will discharge the seaman from his contract, leaves him at liberty to proffer his services as salvor, and any contribution he may subsequently render to the preservation of the ship or cargo, will entitle him to salvage. And even though such contract be not dissolved by shipwreck, yet for the rendition of peculiar services in preserving the wreck and fragments of the ship and cargo, which are without the line of his regular employment, he may be entitled to salvage. And as the duty of the seaman ceases by capture, any services they may subsequently and successfully render to recover the captured ship, will entitle them to salvage.

#### QUESTIONS.

What is meant by salvage? What does it apply to? Who is the salvor? What is the rule, in case he is unsuccessful? How if successful? To whom may he look for remuneration? When is the wreck or loss, a matter of State, and when of Admiralty jurisdiction? What does the Admiralty jurisdiction embrace? How far does it extend upon inland waters? How is the amount of salvage regulated? Upon what principle is it made to vary? What is the usual rate of allowance? What the limit of its variation? What the object? Who are excluded from being salvors? Who must a salvor be? Who does this exclude? Under what conditions may a passenger or officer become a salvor? What effect in regard to salvage does abandonment of ship, and discharge of seamen have? How, suppose such contract be not discharged by shipwreck, and the services rendered be peculiar? How as to services rendered in recapturing the vessel?

PART VIII.

DISSOLUTION OF THE CONTRACT OF AFFREIGHTMENT.

§ 429. The peculiarities which seem incidental to this contract continue throughout, and constitute some of the modes of its termination. Its dissolution before completion, may occur, not only by the act of the parties, but also by the act of the law under the following circumstances.

1. Should the voyage become unlawful ; or

2. Of impossible performance ; or

3. Broken up, either before or after its actual commencement ; and this may occur by war, or the interdiction of commerce with the place of destination. And it is immaterial in this latter respect whether the interdiction be complete, preventing the entry of the vessel ; or partial, relating only to the merchandise on board, and preventing it from being landed. The blockade of the port of destination, thus preventing the landing, discharge, and taking in the return cargo, is sufficient to dissolve the contract. So, also, if the shipper cannot demand the delivery of the goods, by reason of their being exposed to seizure by landing. So, if there be a capture on the passage, thus breaking up the voyage so as to cause a complete defeasance of the undertaking, although there may be a subsequent recapture.

§ 430. But a mere temporary impediment in the way of the voyage, such as an embargo, although for an indefinite period of time, operating merely as a temporary restraint, does not work a dissolution of the contract. A blockade of the port of departure has also the same effect, merely suspending, not dissolving, the contract. To have the latter effect, the voyage must be broken up, or the completion of it become unlawful. Even capture does not, of itself, destroy the contract. It suspends it during the prize proceedings, and it re-attaches in case of recapture. In all such cases, the parties must wait until those obstacles which

merely retard its execution, are removed. If the cargo can endure delay, nothing but occurrences which absolutely prevent the execution of the contract, will discharge it.

### QUESTIONS.

What are the modes by which the contract of affreightment, before its completion, may be terminated by act of the law? Is it necessary that interdiction be complete? May it be sufficient if partial? And applied to what, and how? When is a blockade, and of what, sufficient? When is inability to demand delivery of goods, and for what reason, sufficient? What effect has a capture on their passage? What effect, in this respect, has a mere temporary impediment to the voyage? What illustration of it? What effect has blockade of port of departure? What necessary to work dissolution of the contract? What effect, in this respect, has capture? What must parties do in case of obstacles? What sort of occurrences are required to discharge the contract?

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## CHAPTER II.

### CONTRACT OF BAILMENT.

#### PART I.

##### DEFINITION. KINDS. NEGLECTS.

§ 431. A bailment is a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. The party delivering is the bailor; the party undertaking the trust, the bailee. The subject-matter—the goods delivered, and in relation to which the trust is undertaken, are either personal property, or the services of those who are hired. It will be perceived, the definition states no consideration to support the undertaking to perform the trust. This is rendered unnecessary by means of the delivery. That act on the part of the bailor, and the acceptance charged with the trust to be performed on the part of the bailee, is held to constitute a sufficient consideration, and thus give the bailor a legal right to require the execution of the trust.

§ 432. The point around which gathers the most interest, which is the most important for business men to understand, and which has created no small difficulty in the courts, is to discriminate clearly, and distinguish the exact difference between a bailment and a sale, so as to be at no loss in determining which belongs to one, and which to the other.

A miller gives an agreement to a merchant or farmer, containing the following language :

“ I agree to take of the plaintiffs all the wheat they have at their store-house of a good merchantable quality, and to give them one barrel of first-rate, superfine flour, for every four and  $\frac{3}{8}$  bushels of wheat.”

Another gives an agreement in the following language :

“ We, the plaintiffs, agree to deliver to the defendant, a miller, a quantity of good, merchantable wheat, be the same more or less, *to be manufactured into flour*. For every four bushels and 15 pounds of wheat, is to be delivered one hundred and ninety-six pounds of superfine flour.” The rights and liabilities of the parties are entirely different under these two agreements. The first is a contract of sale, in which so much wheat is agreed to be sold for so much flour. The title to the wheat passes on delivery, and if the mill containing the wheat were destroyed by fire, the loss would fall upon the miller. He must still perform his contract to furnish the flour.

The last is a contract of bailment in which the wheat is delivered for a given purpose, viz. : to be manufactured into flour. The title to the wheat does not pass by delivery, but remains in the bailor. In case of its accidental destruction, without the fault of the bailee, the loss would fall entirely on the bailor, and the bailee would be absolved from his trust. The line of distinction running through the cases will be found to be this. Where the thing to be delivered is capable of identification throughout, or where its proceeds, or the forms into which it may be changed, are to be kept distinct, and to be treated as the thing itself, it is a case of

bailment. Otherwise it is one of sale. Illustrations. *Norton v. Woodruff*, 2 Comst. 153. *Mallory v. Willis*, 4 Comst. 76. *Wadsworth v. Alcott*, 2 Seld. 64. *Foster v. Pettibone*, 3 Seld. 433. A different conclusion has been arrived at in Virginia in the recent case of *Slaughter v. Green*, decided in the Court of Appeals of that State, 1 Rand. 3, in which wheat had been delivered at a mill to be ground, on an agreement *that the miller should return to the farmer a given quantity of flour for so many bushels of wheat*. The wheat being consumed by a fire, it was held *a case of bailment*, and the miller not accountable for the loss. This is in direct conflict with the New York decisions, and may, perhaps, have the effect to leave the question an open one in general jurisprudence.

§ 433. There are five different kinds of bailment. The *deposit*, the *mandate*, the *loan for use*, the *pledge*, and the *hiring*, which is of several different kinds. All these several kinds, however, are brought under the dominion of three different principles.

1. Those in which the execution of the trust is for the exclusive benefit of the bailor, or of some person other than the bailee.

2. Where that execution is exclusively for the benefit of the bailee.

3. Where such execution is for the benefit of both parties; or of one of them, and a third party.

§ 434. There are three different kinds of neglect, for which the different kinds of bailees may render themselves liable.

1. *Ordinary neglect*, which is defined to be the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.

2. *Gross neglect*, which is the want of that care which every man of common sense, how inattentive soever, takes of his own property.

3. *Slight neglect*, which is the omission of that diligence

which very circumspect and thoughtful persons use in securing their own goods and chattels.

### QUESTIONS.

What is bailment? Who are parties, and what called? What is the subject-matter, or thing bailed? What stands as the equivalent for the consideration? What is a form of contract creating a sale? What effect upon the rights of the parties, in case of loss? What form of contract creating a bailment? What effect upon rights of parties in case of loss? What is the criterion distinguishing a bailment from a sale? What are the different kinds of bailment? What three different principles hold dominion over these different kinds? How many different kinds of neglect are there? Specify and define each one.

## PART II.

### DEPOSITS.

§ 435. A deposit is a mere naked bailment of goods to be kept for the bailor, without reward, and to be returned when so required. We have here two parties—depositor, or party depositing, and depositary, or party taking charge of the deposit. It must be a trust *voluntarily* undertaken, and without recompense. Where the bailee is ignorant that he is a depositary, he is not answerable.

§ 436. The depositary assumes the obligation of keeping the deposit with reasonable care. This binds him only to slight diligence, and renders him answerable only for gross neglect. As both diligence and negligence have many gradations, with no clearly defined margins, there is always a difficulty in any case that presents itself, in fixing the limit of liability. This limit is not a fixed one, but varies with the nature, value, and quality of the deposit; the circumstances under which it is made; and sometimes upon the character, confidence, and particular dealings of the parties. It has been said that the depositary must take the same care of the goods deposited as he takes of his own. But this, if adopted as a rule, would in each case necessitate the inquiry what care the depositary was in the habit of taking of his

own property. The slight diligence to which the depositary is held, means that degree of it which persons of less than common prudence, or indeed, of any prudence at all, take of their own concerns.

§ 437. Much doubt relating to the nature and effect of acceptance was created, and long remained, arising out of an inference drawn by Lord Coke in *Co. Litt.* 89 *a. b.*, from *Southcote's case*, *Oro. Eliz.* 815; viz.: that there was no difference between a general acceptance *to keep*, and a special acceptance *to keep safely*, and hence that if a depositary desired to be exonerated from loss by theft, he must make a special acceptance to keep the goods as he would his own. This doctrine would throw upon the general depositary a far greater amount of liability than the law devolves upon him. Inasmuch as the delivery and acceptance constitute the consideration upon which the trust is enforceable, and there can be no delivery without an acceptance, as the trust must be voluntarily undertaken, it is clearly the right of the depositary to make such a *special acceptance* as he may deem proper, and when so made, it qualifies his liability. It is, therefore, in the power of the depositary, if he accept the trust at all, to accept it subject to just the grade or degree of liability he may choose. The inference drawn by Lord Coke, was distinctly overruled in *Coggs v. Bernard*, 2 *Ld. Raymond*, 909. The acceptance may be subject to a particular place of deposit, as on the deck of a ship, and when the depositor intrusts his goods, knowing how and where the depositary will keep them, he must be held as assenting to such a mode of keeping them and hence cannot complain of their loss by the ordinary perils to which they are thereby subjected. *Knowles v. A. & St. L. Railroad Co.* 38 *Maine*, 55. But a *general acceptance* subjects only to the lowest degree of liability. It impliedly stipulates that some degree of care shall be taken of the deposit, but it approximates gross negligence, on which the line of liability runs, so very near to bad faith and actual fraud, that there seems



to be but little distinction between them. *Foster v. The Essex Bank*, 17 *Mass.* 479. The degree of care and diligence which ought to be required according to this case, is to be measured by the carefulness which the depositary uses towards his own property of a similar kind. Although the fact that this same degree of care was taken by the depositary is always admissible in evidence, yet, if it be fully proven, it is not necessarily a conclusive answer, as it is competent notwithstanding to show that the loss was owing to gross negligence. *Doorman v. Jenkins*, 2 *Ad. & El.* 256. In ordinary cases, however, that proof would be sufficient; for as gross negligence implies little if any thing short of bad faith, the fact that he keeps the goods deposited with the same care that he does his own, is at least evidence of his honesty. If his character was dissolute, careless, and reckless, the depositor should not have deposited with him his goods, without some compensation, which would have enabled him to have exacted a higher degree of care and diligence.

§ 438. A question will often arise, as to how far the depositary is at liberty to use the thing deposited? And the rule here is well expressed in the French code, that the depositary has no right to use the deposit without the express or presumed permission of the depositor. The express permission is, of course, always sufficient. The permission may be *presumed* whenever the use would obviously benefit the thing itself, without exposing it to extraordinary perils. A horse, for instance, may be exercised, and a milch cow milked, to preserve the health of each. But jewels deposited should not be worn, for although the use might not injure, yet it would subject them to greater risk of loss.

§ 439. Another question relates to the extent or amount of interest or property which the depositor should have in the thing deposited; and also what special property, if any, passes to the depositary in virtue of the deposit. In regard to the first, it is held that no absolute title is necessary; that a mere special property is all that is essential; and even

that a bare possession of the personal chattel is sufficient to enable him to deposit it, and to give him the ordinary rights against the depositary. As to the second, although the general doctrine has been asserted that all bailees have a special property in the thing bailed, yet, as now understood, the depositary has no special property in the deposit, and yet, in virtue of his possession, and of his liabilities over to the owner, he has undoubtedly a right of action against a mere wrong doer who deprives him of that possession. As his possession is a rightful one, the law gives him adequate power to protect it, and also sufficient to enable him to answer to the depositor.

§ 440. Another obligation devolved upon the depositary is to return the deposit whenever required to do so. This return must be of the individual thing deposited, and in the same condition in which it was received. It is not limited to the thing itself, but embraces also all increase or profits which may have been realized from it. If the deposit is of a perishable nature, it may be sold, and the proceeds returned in its place. In either one of the following instances, a return will be excused.

1. Where it is destroyed by an accident.
2. Where it perishes by its own inherent defects.
3. Where its destruction is owing to its own perishable quality.
4. Where the loss is owing to the slight, or even ordinary neglect of the depositary.

§ 441. A question has arisen whether the innocent bailee is responsible to any other person than to his bailor or his personal representative. He stands upon the strength of his bailor's title, and has engaged to make restitution to him. Hence it was once supposed that to him he was only liable. But it is now considered that he is liable to the true owner; that he can never be in a better situation than his bailor; and that the owner ought always to be entitled to reclaim his property wherever he can find it. The de-

positary, however, is charged with no duty in the ascertainment of title, and hence if he deliver to the bailor in good faith, not knowing the claim of the true owner, he cannot be made liable to the latter. *Nelson v. Jonson*, 17 Ala. 216. No liability attaches to the depositary until he is guilty of some default, some conversion, or some act of gross negligence productive of loss; and unless the depositor or owner relies upon proving some such, he should not bring an action without first demanding the property and obtaining a refusal to surrender it, which is always held equivalent to a conversion.

§ 442. A difficulty may arise as to whom the delivery is to be made where there has been a joint bailment. In such a case, the delivery must be made to all the bailors together, or to one with the consent of all. When there are joint depositaries, each is liable for the restitution of the whole deposit. The place of restoration, if not agreed upon, should be where it is found, or where it ought to be kept. The demand may be made wherever the depositary may happen to be, but the offer to deliver at the place where the property is, or at his dwelling-house, or place of business, will be sufficient.

§ 443. Although it is of the very essence of this species of bailment that no compensation shall be allowed the bailee, yet he is entitled to reimbursement for all necessary expenses, and for all such expenditures as he may have been called upon to make, which were necessary to the preservation of the deposit. The request to assume the duties incident to the bailment, is a sufficient authority on the part of the bailor to expend such moneys out of which a sufficient promise can be extracted for their reimbursement.

#### QUESTIONS.

What is a deposit? Who the parties? How must the trust be? What obligation does the depositary assume? What does this bind him to? What render him answerable for? What difficulty is there in fixing the limit of liability? How is this limit made to vary? What is

objectionable in the rule that the depositary must take the same care of the goods deposited as of his own? What does slight diligence mean? Is the depositary at liberty to make any special acceptance he may choose? What is the effect of a special acceptance? What, if it be subject to a particular place of deposit? What does a general acceptance subject to? What does it impliedly stipulate? To what does it nearly approximate gross negligence? Is the fact that similar care has been exercised as of one's own property admissible in evidence? Can there be a recovery notwithstanding? What is such fact evidence of? If character is dissolute, careless, and reckless, who sustains loss, and who should sustain it? What is the rule as to depositary's using the things deposited? When may the permission be presumed? What illustrations? Must depositor have absolute title in thing deposited? What is essential to enable him to deposit? Has depositary special property in deposit? What are his rights as against wrong doers, and on what founded? What is another obligation devolved on the depositary? What must the return be? And in what condition? What must it embrace? What if the deposit be of a perishable nature? In what instances may a return be excused? Is innocent bailee responsible to any other than his bailor? To what other may he be responsible? On what principle? Suppose he delivers deposit in good faith to bailee when it belongs to another? When does liability first attach to depositary? What should depositor or owner do before bringing suit? To whom is delivery made in case of joint bailment? How when there are joint depositaries? What is the place of restoration? Is depositary entitled to be reimbursed for expenses and expenditures? On what principle?

### PART III.

#### MANDATE.

§ 444. A mandate is when one undertakes, without recompense, to do some act for another, in respect to the thing bailed. The person employing is called the *mandator*; the person employed the *mandatary*. There are three things necessary to create a mandate:

1. The subject-matter of the contract, or some act or business to be done in relation to it. And the thing to be done—the labor and services—are here regarded as the principal object of the parties, while the thing in or about which they are to be rendered is merely accessorial.

2. Whatever is stipulated to be done must be gratuitous.

3. The parties must voluntarily intend to enter into the contract.

The act to be done must have some qualities, as :

1. It must be something to be done in the future.

2. It must have respect to something that is certain, otherwise no contract can arise.

3. It must be of such a nature that it may be deemed the mandator's act through the mandatary's instrumentality.

4. It must be of a nature capable of being done, and not an impossibility.

§ 445. A mandatary, no more than a depositary, can be said to have any special property in the thing, any further than his expenses incurred about it may give him a lien. He has his possessory title, and that, together with his liability over, enables him to bring an action for any tort or wrong done to the thing while in his possession.

§ 446. There has been a difference of opinion as to the legal validity of a mandate contract, that is, of a contract to assume the trusts of a mandatary. Sir. William Jones, following the civil law, insists that damages can be recovered for breaking such a contract, while by the principles of the common law, there being no consideration, there is no binding contract between the parties. In other words the mere *non-feasance*—the neglect to do that which a party, without any consideration, undertakes, subjects to no legal liability. Of this the common law leaves no room for doubt. But where the thing is delivered to the mandatary, who accepts it under the trusts imposed, and enters upon the performance of what he has undertaken, that creates a valid and binding contract which the mandatary is bound properly to perform. Here is a delivery and receipt for a specific purpose ; here are elements of trust and confidence ; here are acts upon one side in consideration of undertakings upon the other ; and in case these are not performed, there occurs a

legal liability. In other words, the *mis-feasance*—the negligent performance of that which is undertaken by which damage occurs—subjects to liability. Illustration of *non-feasance*. A and B are joint owners of a vessel. A voluntarily undertakes to get the vessel insured, but neglects to do so, and the vessel is lost. An action is brought by B against A to recover for the loss. No action could be sustained. *Thorne v. Deas*, 4 *John*. 84. Illustration of *mis-feasance*. B voluntarily undertakes to carry several hogsheads of brandy from one cellar, and deposit them in another. He receives the hogsheads, and enters upon his undertaking; but performs it so negligently and improperly that one of the casks is staved in, and the brandy lost. Here, although the undertaking was gratuitous, and B no common carrier, yet the court held that the plaintiff should recover. *Coggs v. Bernard*, 2 *Ld. Raymond*, 909. This principle is very widely applied. A surgeon is retained, and undertakes the performance of a surgical operation. A person receives a letter to deliver, or money to pay, or a note to collect, and by negligence omits to perform the trust. The retainer and entering upon the operation; the delivery and receipt of the letter, money, or note, creates a sufficient consideration to support the contract, and is a part execution of it, so that the party retained and receiving—the mandatary—although acting gratuitously, becomes responsible for all damages resulting from negligence.

§ 447. In reference to the care and diligence required, the mandatary should occupy the same position as the depositary. They both come under the first of the three principles stated, viz.: that the bailment is exclusively for the benefit of the bailor, or for some person other than the bailee. The mandatary, therefore, like the depositary, should be bound only to slight diligence, and responsible only for gross neglect. But there is this difference between the two, which necessarily leads to the creation of some distinctions in the one which do not obtain in the other. The

mere keeping of the deposit, demands no particular skill or knowledge, whereas the undertaking of the mandatary, being to do something, to render some service often in some special capacity, may not unfrequently require the possession and exercise of such knowledge and skill, as is not possessed by men generally. The same general principle or rule, has here been proposed, and with the same result as in the case of the depositary, viz.: that where the mandatary renders the same kind of service, and bestows the same care and attention upon the subject-matter of the bailment as upon his own property of the like kind, that is *prima facie* sufficient to repel the presumption of gross negligence.

§ 448. Subject to the rule last mentioned, are some distinctions growing out of the situation or occupation of the mandatary, and the nature or character of the service to be rendered. And the first is, that a mandatary who acts gratuitously in a matter where neither his situation, occupation, or employment, implies any particular knowledge, or professional skill, is responsible only for bad faith, or gross negligence. A merchant undertakes, gratuitously, to enter a parcel of goods for another, together with a parcel of his own of the same sort, at the custom-house for exportation, and made an entry under a wrong denomination, in consequence of which, both parcels were seized. Held that he was not liable for the loss, as he took the same care of the goods bailed as of his own, and was not of such a profession or employment as necessarily implied skill in what he undertook. *Shields v. Blackburne*, 1 *H. Black.* 158. But if, in this case, the undertaking had been by some clerk or employee in the custom-house, or some one who, by his employment, was led to be familiar with the manner of doing business there, and he had entered upon the service, and committed such a mistake, he would have been liable. This latter affords the illustration of another rule, viz.: that if his situation or employment does imply ordinary skill, or knowledge adequate to the undertaking, he will be responsi-

ble for any losses or injuries resulting from the want of the exercise of such knowledge or skill. In a case where the person employed is known to possess no particular knowledge or skill, and yet undertakes to do the best he can under the circumstances, all that can fairly be required of him is the exercise, to the best of his ability, of the judgment, knowledge, and capacity he possesses. In all cases, the general test of liability is considered to be—whether the mandatary has omitted that care and diligence which bailees, without hire, or other mandataries of common prudence, are accustomed to take of property of a like character or description.

§ 449. The depositary who refuses to deliver up the deposit on the demand of the depositor, and the mandatary whose misuser of the subject-matter is such as to afford evidence of conversion, both place themselves under very different liabilities by such acts, because their possession is then wrongful, and they take upon themselves the responsibility for all losses. Thus, where a master of a ship had gratuitously received a box containing doubloons belonging to a passenger accidentally left behind, and who during the voyage opened the box, and, finding the contents valuable, took them out, and lodged them in a bag in his own chest in his cabin, where his own valuables were kept, and the bag was lost; it was held that he was responsible for the loss, on the ground that he had imposed upon himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration of the place of custody. *Nelson v. Macintosh*, 1 Stark. 237. This would certainly be carrying the liability of the mandatary to a very great length, more especially if no question of good faith was raised in the change of custody. The safe ground would be to submit to the jury the question whether such change was in bad faith, or was intended as a conversion, and if so, then to hold him responsible.

§ 450. The mandatary is also under an implied obliga-



tion to render, upon request, a full account of his proceedings ; showing that his trust has been faithfully performed ; or, if badly performed, what reason or excuse there may be for it. He is bound, also, to restore the thing itself with all its increments, earnings, and gains. He is entitled to be reimbursed all expenses and charges reasonably incurred in the execution of the mandate, and to be indemnified from liability upon all contracts he has entered into with others, in the proper discharge of the duties he had undertaken.

§ 451. There are various modes of dissolving the contract of mandate. It may be dissolved by either party before entry upon it.\* And after entry, as it is based on personal confidence, it is dissolved by the death of the mandatary. If, however, the mandate has been so far performed before the death of the mandatary as that nothing remains involving the exercise of any discretion to complete it, (as if the commission were to purchase books, and send them to the mandator, and they were purchased, but not sent,) it will be the duty of the personal representative of the mandatary to complete the mandate. The death of the mandator also dissolves the contract ; but if the mandate is in part executed, the personal representative of the mandator will be bound to keep the mandatary indemnified from all damages he may suffer in consequence. A change in the state of the parties, as the marriage of a femme sole, the insanity of either one of the parties, may operate a dissolution. So, also, the authority given may be revoked by operation of law, as where the power of the mandator over the subject-matter ceases, or by the act of the mandator revoking such authority.

#### QUESTIONS.

What is a mandate? Who the parties to it? How many things necessary to the creation of a mandate? What are they? What must be the qualities of the act to be done? What interest, property, or title, has the mandatary in the subject-matter? What is *non-feasance*, and what rights, if any, does it give at law? What is a *mis-feasance*, and

what rights, if any, does it give? What illustrations of non-feasance and mis-feasance? What position as to care and diligence does the mandatary occupy? Under what principle do both the mandatary and the depositary come? What is the mandatary bound to, and responsible for? What, the point of difference between the depositary and the mandatary? What is the rule of liability derived from his care of his own property? What is his liability where his situation, occupation, or employment, imply no particular knowledge or professional skill? What illustration? What contrary illustration? What rule derivable from it? What where the person employed is known to possess no particular knowledge or skill? What is the test of liability considered to be? What is the position of the depositary and the mandatary who convert to their own use the property? For what are they liable and why? What illustration? What would be the safe ground upon which to place it? What else is the mandatary under obligation to do, and upon what? What must he show? What must he restore? What is he entitled to be reimbursed? Against what indemnified? Who may dissolve the contract of mandate before it is entered upon? After entry upon it, what may dissolve it? And why? Suppose the mandate almost completed, what is the rule? How otherways may the contract be dissolved?

#### PART IV.

##### LOAN FOR USE.

§ 452. This is defined to be a bailment or loan of an article, for a certain time, to be used by the borrower without paying for the use.

The writers on bailment have given this a prominent place among the different kinds, of which they enumerate five. They seem to take for granted that a contract based upon the above definition would be valid, and enforceable at law. That it would be so under the civil law, there can be no question. But is it so under the common? A brings his action against B to recover a span of horses, which he complains that B wrongfully withholds from him, having made demand and been refused. B sets up, as a defence, that he borrowed of A the span of horses for the space of five days to plough a certain piece of land. That by virtue of this loan, he became possessed of the horses,

and was employing them in the ploughing of the said piece of land, which was not yet completed, and that the action was brought by A within the five days. Is the defence perfect at law against the action by A? If so, then this third kind of bailment is entitled to its position and rank in the list of bailments; if not, then it should be stricken from that list, and there are but four instead of five different kinds of bailment. The difficulty is with the consideration. Is there any? and if so, what is it? Who is the promisor, and who the promisee? The only promise made by B is to use the horses for a certain purpose, and at the end of a certain time to return them. This he has not broken. It may be said that A is the promisor, and that his promise is that B shall have the horses for the purpose and time specified. Granted. And then what binds this promise? Is there any benefit to the promisor? None whatever. Is there any injury or disadvantage resulting from the performance of the promise to the promisee? On the contrary, all the benefit is to the promisee. His injury, if any, is derived from the breach, not from the performance of the promise. Mr. Edwards, see *Edwards on Bailment*, 156, is inclined to think there is a contract between the parties, embracing *mutual promises*, expressed or implied from the circumstances. But what promise is there on the part of B in which A has any possible interest, or such an interest as amounts to a consideration? And if there is a promise on the part of A to B, as there must be to defeat the action, what is the consideration that binds him to its performance? There does not appear to be any, and I am unable to perceive upon what legal principles the defence can be sustained. It may be said that the same objection lies to the kind of bailment termed deposits; and so far as there lacks the elements of a contract that will enable the depositary to resist an action by the depositor to recover the deposit, having first made demand of it and been refused, it is entirely true. But that simply seeks to ascertain what are the mu-

tual rights and obligations of the parties, while the relations continue between them ; those relations being at any time terminable by the depositor. It may not, therefore, be improper here to inquire very briefly as to the obligations of this kind of bailee while the loan for use continues in force.

§ 453. This comes under a different principle from either one of the preceding. It ranks under the second general principle stated, and is a bailment where the execution of the trust is exclusively for the benefit of the bailee. Hence such bailee is held responsible for slight neglect. The extraordinary diligence to which he is bound is not satisfied with that degree of care which he would naturally exercise over his own property. He must bring to it all possible care. The use made of the thing borrowed must be strictly confined to that for which it was obtained. It must be also limited to the person obtaining it. Thus, where to an action of trespass the plea interposed was, that the horse was lent to him by the plaintiff, and license given him to ride, in virtue of which the defendant and his servants had alternately ridden the animal, held, that the license was annexed to the person of the defendant, and could not be communicated to another. *Bringloe v. Morrice*, 1 *Mod.* 210.

§ 454. A great difficulty here occurs in settling what shall be deemed slight neglect. It must, of course, depend much upon the circumstances of each particular case. There is no liability for losses by inevitable accident, or by casualties occurring without any fault of the borrower. The same also where the loss occurs from robbery or the exertion of superior force. The return of it must be at a proper time, and in a proper condition, together with all its increments and offspring. If not so returned, the borrower will be held liable for all losses and injuries to which it may be subjected. The return must be to the dwelling-house of the lender, unless the thing properly belongs elsewhere. And hence where the defendant borrowed the plaintiff's horse

and carriage, which, at the time, were at a livery stable, the parties residing in the same city; it was held the return should be at the plaintiff's residence. *Esmay v. Fanning*, 9 Barb. 176.

Restoration to the true owner, doing no injury or injustice to the lender, is held to be sufficient. Where the loan has been to several persons jointly, each is liable *in solido* for its return. The borrower is never liable for any loss or injury occasioned simply by its use. The risk of that is taken by the lender. But if any loss or injury occurs through the negligence of the borrower, he may be made liable in an action for the damages. The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrong doer. And in all cases of simple bailment, without reward, an action may be maintained either by the bailor or bailee for any wrong done to the bailee's possession. The bailor can bring it by virtue of his general property in the thing bailed, and the bailee because of his possession and liability over to the bailor. But a judgment and satisfaction by one is a bar to an action by the other.

#### QUESTIONS.

What is a loan for use? Does this species of bailment embrace a contract valid and enforceable at law? What principle does this species of bailment come under? What is the bailee here held responsible for? What is the extraordinary diligence here required not satisfied by? What must he bring to it? To what must the use of the thing borrowed be confined? To what must it be limited as to person? What illustration? What does slight neglect depend upon? What is the liability in case of loss by inevitable accident? Or by casualties? How as to robbery, or superior force? How must the return be? What with? What if not so returned? Where must the return be? What illustration? To whom should the return be made? What liability where loan made to several jointly? For what is borrower not liable? Who takes risk of such? To what liable, when loss occurs through negligence? Has borrower any special property? Who may bring action when wrong is done to possession? What effect has recovery and satisfaction by either?

## PART V.

## PLEDGE.

§ 455. The pledge or pawn is a bailment of personal property as a security for some debt or engagement. The first inquiry here is as to the property that is susceptible of being pledged. A debtor may pledge any of his personal property down to, and including, his necessities. There is nothing exempt except the pay and emoluments of officers and soldiers. One essential to the creation of the pledge is the delivery of the article pledged to the pledgee. This necessity serves as a limitation of the subject-matter of the pledge, confining it to personal property in actual existence, and susceptible of delivery. The great convenience of pledging, and the frequency with which it is resorted to, have induced the effort to escape from both the last mentioned limitations. There could be no question but the subject-matter of the pledge-covered property beyond what is usually styled effects; that it embraced also things in action, such as negotiable paper, and other evidences of debt—in other words, that it would go as far as there was a thing susceptible of delivery. But a very large proportion of the capital of the country is invested in stocks of incorporated companies, such as bank, railroad, insurance, &c., in which the owner holds merely the scrip or certificate of the company that he is owner of the number of shares stated. The question is, how can this stock be pledged so as to be a valid security to the pledgee. The method is to deliver the scrip, or company's certificate, to the lender, accompanied by a power of attorney to such lender, authorizing the actual transfer on the books of the company. This actual transfer is frequently postponed, or entirely omitted, but actual notice of the transfer, as such security, should be immediately given to the company, or otherwise a *bona fide* purchase and transfer on the company's books might embarrass, if not

endanger, the security. The limitation to property in actual existence precludes the pledging of that which is to be acquired *in futuro*, but the law permits an hypothecation in such case, which answers very effectually the purpose of a pledge. A brickmaker stipulates with the lessee of a brickyard in which he manufactures bricks, that they should retain the bricks to be made there, as security for their advances to him. Held that this operated as a hypothecation, and that the bricks became pledged under the contract as fast as they were manufactured. *Macomber v. Parker*, 14 *Pick.* 497, 505.

§ 456. It becomes of great importance in considering the doctrine of pledge to understand the points of difference between a *mortgage* of goods, and a *pledge* or *pawn* of them. In a *mortgage* the entire legal title passes, conditionally, to the mortgagee, and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to allow a redemption. In the *pawn* or *pledge*, a special property only passes to the pawnee or pledgee, the general property still remaining in the pawnor or pledgor. Again, in the *mortgage*, inasmuch as the right of property passes by the conveyance to the mortgagee, the possession is not essential to create or support the title. Hence that possession may remain in the mortgagor at common law, and yet the mortgage be valid; because the title transferred enables the mortgagee to possess himself of the property. But in a *pledge*, the right of the pledgee is not consummated except by possession; and when that is relinquished, the right of the pledgee is extinguished or waived. Although the above distinctions will be admitted to be correct, yet there may be a pledge although the legal title passes to the pledgee. An illustration of this would be where a promissory note is given, secured by stocks, deposited with the creditor by the debtor as collateral security for the amount contained in the note. Here the legal title must pass to the creditor, and the principle is so far modified as

to declare that the transfer of the legal title is not in any case inconsistent with a pledge, if the debtor has a right to the restoration of the property, on payment of the debt at any time, although after it falls due. *Wilson v. Little*, 2 *Comst.* 443.

§ 457. The next inquiry relates to the amount of interest or property which it is necessary for the pledgor to have in the pledge in order that he may make such a disposition of it. We can only inquire as between pledgor and pledgee, and as between them this inquiry can very seldom arise. The pledgor, however weak or deficient his title, has always his right to redeem as against the pledgee, and the latter has no right to interpose the title of a third person, unless that third person enforces against him his own superior right of property. But where the pledgor has only a limited title in the thing pledged, as an estate for life, or for years, the security he gives to his creditor is limited to the extent of his interest, and when that expires the pledgee must surrender it up to the person who succeeds to the ownership.

§ 458. This kind of bailment comes under the third principle stated, viz.: where the execution of the trust is for the benefit of both parties, or of one of them, and a third party. The benefit to the pledgee is that he is rendered secure in the payment of his debt, while the pledgor is thereby enabled to procure an extension of credit. This binds the pledgee to take ordinary care, and renders him answerable only for ordinary neglect. It is essential to the being of a pledge that it should be delivered as security for some debt or engagement. It may be for any kind of engagement; so also the debt may be one to be incurred in the future.

§ 459. The pledge carries with it, as accessorial, all its natural increase. Its security for a debt alone depends upon its remaining in the possession of the pledgee. Hence its loss, or re-delivery to the pledgor, or its voluntary waiver, will deprive the pledgee of his security.



§ 460. The pledgee, unlike every previous bailee, has a special property in the pledge. This entitles him to the exclusive possession of it, during the time, and for the objects for which it was pledged, not only as against strangers, but also the pledgor himself. But his rights grow out of, and are strictly defined by, the contract into which the two parties have entered. If two debts at the time, or subsequently, become due to the pledgee, he can retain the pledge only as security for the one it was given to secure. A new debt clearly shown to have been contracted upon the credit of the pledge, may enable the pledgee to retain it until payment; but this is a fact the creditor is bound to make out. It is never to be extended by mere intendment. It has an application, however, not merely to the debt or engagement, but also to the interest, and to all incidental charges and expenses.

§ 461. But the right of retainer alone would never enable him to realize his debt. He has a further right of selling the pledge, and of applying its proceeds towards the payment of his debt, if the pledgor fails in his engagement to redeem it. This is on the supposition that some time is fixed upon for such payment and redemption. There may be no time fixed, and in such case the pledgee may insist upon a prompt fulfilment of the engagement; and if the pledgor neglects or refuses, he may, upon due demand and notice to him the pledgor, require a sale of it. The effect of the debts' falling due, and remaining unpaid, is not to transfer the absolute property in the pledge to the pledgee. It is not, therefore, any more his property after the falling due of the debt than it was before. What further right then has he consequent upon that fact? His rights are twofold. He may proceed personally against the debtor and collect his debt out of his property, and that would operate to redeem the pledge, or he may proceed against the pledge, which is a proceeding *in rem*, and take the necessary steps to apply it on his debt. To do this, the first thing incumbent upon him is to

demand the payment of the debt, and this he must do, although the debt is payable presently without demand, and although by the terms of the pledge, he was authorized to sell at public or private sale without notice to the debtor. *Wilson v. Little*, 2 Comst. 443. This requires much caution in proceeding, because if the pledge has been improperly sold, the pledgor may maintain an action for its value without making a tender of the debt for which the property was pledged. Having properly made the demand and been refused, he has an election of either one of two modes of proceeding against the pledge. He may file his bill in equity, asking a decree of sale, and thus foreclose the equity of redemption of the pledgor; or he may adopt the more summary method of selling without judicial process, upon merely giving reasonable notice to the debtor to redeem. The notice, however, is indispensable. *DeLisle v. Priestman*, 1 Brown's Penn. Rep. 176. There is, however, one exception to the right to sell in case of non-payment, and that is when the pledge consists of negotiable paper. Then it is held that in the absence of any special power authorizing a sale, the pledgee has no right to sell the securities either at public or private sale, but must hold on, collect, and apply as the paper falls due. *Wheeler v. Newbold*, 16 New York Rep. 392.

§ 462. Where the pledge for one debt consists of several things, each one is liable for the whole, and if one or more should perish without default of the pledgee, he may look to all the others for his indemnity. Any surplus remaining, after paying the debt, belongs to the pledgor, and he is responsible for making up any deficiency it may fall short of paying.

§ 463. The rights of the pledgee do not go far enough to enable him to appropriate the pledge to the payment of his debt. His only remedy is to sell it. Nor can he become the purchaser of it on a sale. Should it be of greater value than the debt, and hence lead the pledgee to decline selling, thus in the end practically appropriating it to the debt, the

pledgor could undoubtedly have relief in equity, which would decree a sale and payment over of any surplus to the pledgor.

§ 464. In regard to the extent to which the pledgee may rightfully use the pledge, the following rules are applicable. If the use is essential to its preservation it is then not only his right, but his duty to use it. If it is positively injurious to the pledge, as in the case of clothes, then such right is interdicted. If the keeping be a charge to the pledgee, as in the case of a cow or horse, then it may be used by way of recompense for the keeping. As the pledgee is bound to account for all income, profit, or advantage, derivable from the pledge, he may be allowed first to deduct all necessary charges and expenses. And so also all extraordinary expenses incurred by him in its preservation.

§ 465. Some diversity of opinion has prevailed relating to the rule of liability in case the pledge sustains injury or loss. It seems to be clearly conceded that in case of loss by casualty, or by unavoidable accident, or by superior force, such as robbery, or where it perishes from intrinsic defect or infirmity; the pledgee will not be held responsible, without the pledgor's showing, in connection with the loss, and conducing to it, some act or omission in violation of his duty. The difference of opinion has been as to whether the mere fact of its being stolen should subject to liability, the civil law taking the affirmative, and the common, as expounded by Lord Coke, 1 *Coke's Inst.* 89 *a*, the negative. A compromise has finally been effected by not considering the mere fact of stealing as evidence of negligence or the want of it; but to go into an examination of the circumstances under which it occurred, and to determine from them, whether the negligence was such as should, or should not, subject to liability. This is undoubtedly the equitable rule, as the larceny may have occurred under circumstances of entire innocence on the part of the pledgee, or it may have grown out of a culpable negligence in exposing it. This

doctrine only applies while the relations growing out of this peculiar contract continue. These relations may cease when the pledgee does anything clearly inconsistent with his duty, or in neglect of it, or when, on being tendered the debt, interest and expenses, if any, he refuses to redeliver the pledge. His special property in it then ceases. He becomes a wrong doer, and the pledge remains at his sole risk. Subject to liability for loss the pledgee has the power of assigning it over to another for safe keeping, or he may dispose of his qualified property in it by way of sale or assignment as collateral security for a debt.

§ 466. The most important right of the pledgor, is that of redeeming his pledge. The difference in this respect, between a pledge and a mortgage is, that in the latter the title becomes absolute on non-payment of the debt, and nothing but the equity of redemption remains. But in the former, the pledgor, having never parted with the general property, may redeem at law, although he has not, by payment on the day, strictly complied with the conditions of his contract. This right of redemption is so inherent in the very nature of the pledge that the law makes it inalienable, and renders void all contracts stipulating that the pledge shall be irredeemable. In case of the death either of the pledgor or the pledgee, the rights and obligations belonging to each descend to, and rest in, the personal representatives.

§ 467. A point of much doubt and difficulty has arisen regarding the right of a sheriff, under an execution against the pledgor, to take the pledge out of the possession of the pledgee, and sell his right and interest in it. In the State of New York the question came up in *Stief v. Hart*, in which the charge of the court raising the question was, that the sheriff, holding an execution against the pledgor, may, by virtue thereof, take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein. The Supreme Court affirmed this doctrine, and in the Court of Appeals 1 *Comst.*

20, the judges being equally divided, the judgment of the Supreme Court stood affirmed. This, in a recent case, is still regarded as an open question.

§ 468. There are several modes of extinguishing the contract of pledge, as : 1. By payment or discharge of the debt. 2. By taking a higher or different security with no agreement to retain the pledge for that also. 3. By extinction of the debt by operation of law. 4. By destruction of the thing pledged. And 5. By any act of the pledgee amounting to a release or waiver of the pledge.

### QUESTIONS.

What is a pledge? What the first inquiry? What may a debtor pledge? What only is exempt? What is essential to the creation of a pledge? What is the limitation of a pledge? What has been the effort in regard to this limitation? What beyond effects may be pledged? How far does it go? How is stock held? What, the evidence of its ownership? What is the method of pledging stock? What should be given to the company? For what reason? How can the purpose of a pledge be answered as to future property? What instance in illustration? What is the important point of difference between a mortgage and a pledge of property? What, the difference between the two as to the point of possession? For what reason may there be a pledge where the legal title passes to the pledgee? What instance in illustration? What amount of interest or property is it necessary for the pledgor to have in the pledge? When can the pledgee interpose the title of a third person against the claims of the pledgor? How is it when the pledgor has only a limited title to the pledge? What principle does this species of bailment come under? What, and with whom, is the benefit in this kind of bailment? What kind of care and neglect are here devolved upon the pledgee? What is essential to the being of a pledge? What does the pledge carry with it? What does its security for a debt depend upon? How may a pledgee be deprived of his security? How does the pledgee stand related to the pledge? What does his special property entitle him to? What do his rights grow out of, and by what defined? What the rule where there are two debts contracted at the time, or one subsequently? What the rule when a new debt is contracted on the strength of the pledge? What is the creditor to make out? What further right to the pledgee besides that of retainer? How is it where there is no time fixed for the payment of the debt? What effect has

the debt's falling due being unpaid and the pledge remaining in the hands of the pledgee? What then are the rights of the pledgee? What is the first thing done in proceeding against the pledge? After demand and refusal what next? What course must he take when the pledge consists of negotiable paper? What his rights when several things are pledged for one debt? What becomes of any surplus remaining? How in case of deficiency? Can the pledgee appropriate the pledge in payment of his debt? What is his only remedy? Can he become a purchaser on its sale? Suppose it is of greater value than the debt, and he omits or declines selling it? What are the rules relative to the use of the pledge by the pledgee? What may be deducted from the income, profit, and advantage? In case the pledge sustains loss or injury, what is the rule of liability? When is the pledgee clearly exonerated from liability? How is it when it is stolen? What then the rule of the civil, the common law, and the compromise? When does this doctrine only apply? When the relations between pledgor and pledgee cease, and how may they be made to, what is the rule? What may the pledgee do subject to his liability for loss? What is the important right of the pledgor? What the difference in this respect between a mortgage and a pledge? How strictly is the right of redemption guarded? What occurs in case of the death of either pledgor or pledgee? What is the right of a sheriff under an execution against the pledgor? What are the several modes of extinguishing the contract of pledge?

## PART VI.

## CONTRACT OF HIRING.

§ 469. This is a bailment of a personal chattel where a compensation is to be given for its use, or for labor or services about it. Or it may be called a loan for hire, or a hiring or letting of goods, or of labor and services for a reward. This is designed to cover all the possible kinds of hiring, whether it applies to the thing hired, or the labor and services hired about it, or to labor and services hired generally. Including, as it is made to do, the duties and responsibilities of the innkeeper, and the common carrier, it is by far the most important and extensive of all the different kinds of bailment.

§ 470. In the *hire of things*, we have two parties, the *letter to hire*, and the *hirer*. It is a contract by which the

hirer, for a compensation, either expressly stipulated, or left to be legally ascertained, as to amount, obtains from the letter to hire, a certain chattel, usually for a certain purpose. The rights, duties, and liabilities of each party flow naturally from the terms of the contract. In the first place, there is *the thing* which is the subject-matter. And this it is obvious must be in existence, and capable of being let to hire. There must be some *time* during which the bailment is to continue, and some *purpose*, either express or implied, to which the thing is to be put. It must be adapted to this purpose, and as susceptible of accomplishing it as other things of the like kind ordinarily are. The hirer must have the perfect right to its use and enjoyment during the time, and for the purpose, for which it is hired. To secure him this, one thing is necessary which forms no part of the loan for use, and that is the element of price, or compensation for the use. This should be made certain and determinate by the stipulation of the parties, or it should be capable of being reduced to certainty by legal means. Both the thing itself, and the purpose to which it is to be used, must be such as the law sanctions and sustains. Tools and instruments are let by a locksmith to thieves for the purpose of burglariously entering houses and stealing goods from them. Such a bailment would, of course, be illegal and void.

§ 471. The obligations of the *letter to hire* relate principally to his duties in reference to the thing itself. He is not only bound to deliver it to the *hirer* in a fit order and condition, but also is to keep it in suitable repair, and to warrant it against those faults and defects which would prevent the due enjoyment and use of it. If any such are known to exist, they subject him to an action as for a deceit; if not, they deprive him of all remedy on the contract. He is also to do no act that will disturb or interrupt the hirer in its free use and enjoyment. The principle upon which the repairs and warranty against defect should be governed is, that the thing should be kept by the *letter to*

*hire* during the entire period of the bailment, in such a state and condition as at all times to subserve the purpose for which it is employed. Otherwise the consideration, or price of the hire, would fail, and the contract be broken.

§ 472. The *hirer* has several obligations to perform on his part. During the continuance of the contract, and while using it for the purposes contemplated in the bailment, he has a special property in the thing sufficient not only to enable him to protect himself against a wrong doer, but also against the owner himself. He has purchased the right to its exclusive use and enjoyment during the period of the bailment.

§ 473. The *hirer* is bound to put and keep the thing employed in the use, and for the purpose, contemplated in the bailment. The diversion of it to a different use or purpose will not only render him liable for damages for a breach of contract, but will also subject him to a different grade of liability for loss. If such loss occurs during the *misuser*, in order to sustain an action of trover for its value, it must be shown on the part of the bailor that the *misuser* occasioned the loss. *Harvey v. Epes*, 12 *Gratt.* 153.

§ 474. Another source of duties is derived from the care and diligence the *hirer* is bound to exercise in reference to the thing he hires. This species of bailment being for the mutual benefit of both parties, the hirer is bound only to the exercise of ordinary care, and answerable for ordinary neglect. Inevitable casualty or superior force will always exonerate. And there will be no liability if there has been no omission of reasonable diligence. Slaves hired of the owner run away from the hirer in a foreign port and are lost. They might have been confined and the loss prevented. Held, that if the hirer acted in good faith and with reasonable care he would not be responsible. *Beverley v. Brook*, 2 *Wheat.* 100. The proof of sufficient negligence to charge the hirer must be made by the letter to hire.

§ 475. The *hirer* must also restore the thing at the



close of the contract in as good a condition as when received, except the effect upon it of natural wear, the act of God, or any unavoidable accident. He must pay the hire or recompense. This contract may be terminated either by efflux of time, by accomplishing the object for which it was hired, by the destruction of the thing hired without the fault of the hirer, by a voluntary dissolution of the contract, or, by operation of law, as in case the hirer becomes the owner of the thing hired.

§ 476. Another species of hiring is where the labor and services of others about the thing are the subject-matter of the hiring. This properly only applies where the stock and materials belong to the bailor or employer, and are entrusted to the bailee, who employs the labor and services of others to be expended upon them. There are, however, many different ways in which questions come up under this species of bailment. Not unfrequently, the thing about which the labor and services are to be performed, and while they are in the act of being so, perishes by its own inherent defect, or by some means is destroyed; and then arises the question as to loss, and as to compensation for services. The risk of loss in such case usually follows the ownership of the materials. The workman who has merely added his labor to the property, without, in any way, conducing to the loss, ought not to be the sufferer by it. But if he has made his contract in such a way that he is to complete the work for a specific sum before payment, and the work being nearly completed, the thing is destroyed by an accidental fire, he can recover nothing; as the performance being a condition precedent, then devolves upon him the whole risk. And so if the workman has furnished the materials, the loss will fall upon him. And he will also take the risk of loss when it has in any way resulted from his own unskilfulness in the performance of his labor and services.

§ 477. This contract being for the mutual benefit of both parties, all that the law, upon its own principles, should

require, is ordinary diligence. But the occasions here are very frequent where something beyond ordinary care and diligence is required. This is always the case where the element of skill is necessary to the performance. Wherever this is required and the party employed professes to possess all that is essential to the business, and undertakes to do it for hire, he will be held responsible for the exercise of such an amount of it as is necessary for the accomplishment of his undertaking. A person employs a mechanic or artisan to erect a stove in a shop, and lay a tube under the floor for the purpose of carrying off the smoke, and the plan fails. The workman is entitled to no compensation, and if damages are sustained will be liable for them. *Duncan v. Blundell*, 3 Stark. 6. The degree of skill and diligence required is by no means always the same. It rises in proportion to the value, delicacy, and difficulty, of the operation. Nothing, however, can be legally demanded beyond the ordinary skill in the particular business or employment to which the person employed belongs. This has been the most frequently illustrated in questions arising out of surgical operations. The rule here is, that the physician or surgeon must apply, without mistake, what is settled in his profession. The standard of ordinary skill required is: "that degree and amount of knowledge and science, which the leading authorities have pronounced as the result of their researches and experience, up to the time, or within a reasonable time, before the issue or question to be determined is made." *Leighton v. Sargent*, 7 Foster, 460. A different rule however prevails where the bailee, or person employed, does not profess, and is known not to possess, the skill and knowledge required for an operation; but, nevertheless, is employed on some sudden emergency. All he is responsible for is the reasonable exercise of the skill and knowledge he may actually possess.

§ 478. The question still remains as to the rights of the bailee, or person employed, where the work has failed of

completion through his own neglect. These depend upon the nature of the contract into which he has entered. If that is to work by the day, he will be entitled to recover what his work is fairly worth, after deducting all damages occasioned by his default. But if his work is done under an entire contract, special in its provisions, he will have to abide by its precise terms. A builder enters into a contract to erect a building upon the land of another. The performance is to precede payment, and is a condition thereof. The builder substantially fails to perform on his part, but performs so far that the owner and employer occupies and enjoys the erection. Held, that the bailee can recover nothing for his labor and materials. That the bailor, or employer, in such a case, may retain without compensation, the benefits of a partial performance, when from the nature of the contract, he must receive such benefits in advance of a full performance, and is, by the contract, under no obligation to pay until the completion of the performance. *Smith v. Brady*, 17 *New York Rep.* 173. Where work is done under a special contract at estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is to control so far as it extends, and for the extra labor the bailee is to receive what it is shown to be worth. *Dubois v. Delaware and Hudson Canal Company*, 4 *Wend.* 285. The same principles prevail here as in the deposit and mandate in regard to the return of the identical thing on which the labor and services have been performed. These must guide throughout, and distinguish, every where, cases of bailment from those of sale.

§ 479. There is another division under this species of bailment termed *deposit for hire*, embracing *warehousemen*, *forwarding merchants*, *wharfingers*, &c., in which the contract is also for the mutual benefit of both parties, requiring ordinary care and diligence, and rendering responsible for ordinary neglect. These require no special consideration here. But there is another class extensive and peculiar from

any hitherto considered as to the liabilities involved, which require more consideration. This is the class of INNKEEPERS, whose liabilities, from motives of public policy, are far more severe than any other bailees except common carriers.

§ 480. An innkeeper is defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. The inn which he keeps is defined to be a house, where the traveller is furnished with every thing he has occasion for whilst on his way. An innkeeper differs from the keeper of a boarding-house, in that the former holds himself out to the public as ready and willing to receive all travellers or wayfarers that desire accommodations for such a compensation as shall be just and reasonable; while the latter keeps only select persons, usually making with each a special contract. In the State of New York, and in most other States of the Union, there are statute regulations applying to inns and taverns. In order to constitute them such, they must be licensed by the commissioners of excise; and the special privileges thus conferred constitute the keeping a public house a kind of personal trust, which is not susceptible of assignment, so as to convey any rights and privileges to another.

§ 481. There is also a corresponding difference between the guest of an inn, and the boarder or lodger of a boarding-house. The former is a traveller, passenger, wayfaring man, not a friend or neighbor. The length of time he remains there, whether an hour or a month, has no effect in determining his character. If he takes lodging leaving his horse there, and then goes elsewhere to lodge, he is still a guest. The boarder or lodger becomes such by the contract made with the keeper of the boarding-house, and if he comes to an inn under a special contract to board and sojourn there, he is simply a boarder, and not a guest. A guest is not created by simply leaving goods at an inn for which no compensation is paid. *Gelley v. Clarke, Cro. Jac.*

188. The rights, duties, responsibilities, and remedies applying to the innkeeper and his guest, and to the boarding-house keeper and his boarder, are wholly different in their origin, nature, and character. The latter are mainly governed by the contract into which the parties enter, while the former are left to the principles of the common law.

§ 482. As the innkeeper makes a standing offer to the public to accommodate all who call upon him for that purpose, he is bound to receive as guest, and to entertain, as far as his accommodations extend, all such ordinary travellers as may desire to avail themselves of his offer. By improperly refusing, he may subject himself to an action. He is not, however, obliged to receive or retain a guest who conducts himself disorderly, nor any one having an infectious disease, nor any one who would endanger the safety of his guests. The principal contract with the innkeeper relates to the accommodations of his guests; but as accessory to that, is also included the receiving and safe keeping of the baggage; this he is, also, bound to receive, and cannot refuse to take charge of, because of suspected persons in the inn for whose conduct he is not willing to be responsible. He is under no obligation to entertain such persons at the inn.

§ 483. The liability of the innkeeper was early established. In *Calye's case*, 8 *Coke*, 63, it was said that by the custom of the realm, innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage, in any manner shall thereby come to their guests, from the negligence of the innkeeper or his servants. It was held in this case, that if a guest come to an inn and direct that his horse be put to pasture, and the horse be stolen, the innkeeper is not responsible. But it was agreed that if the owner had not directed that the horse be put to pasture, and the innkeeper had done it of his own accord, he would be responsible. In a more recent case, the travel-

ler directed his horse to be put into the stable, and himself and some goods was received into the inn. ' His gig was placed by the innkeeper in an open street, without the yard, and where he was often accustomed to place gigs. It was stolen, and the innkeeper was held liable, although it was stated that this was on the extreme limit. *Jones v. Tyler*, 1 *Adol. & Ellis*, 522. See also *Hallenbake v. Fish*, 8 *Wend.* 547, in which a horse was delivered to the ostler at an inn to be fed, and the ostler took off the saddle and bridle, and left them in a barn belonging to the inn, and they were stolen. The innkeeper was held responsible. Also *Clute v. Wiggins*, 14 *John.* 175. In *Bennet v. Mellor*, 5 *Term. Rep.* 274, a servant of the plaintiff came to deposit some goods at the inn, which the innkeeper declined receiving. The servant sat down in the inn as a guest with the goods behind him, and they were stolen. Held, the innkeeper was responsible.

§ 484. It is not necessary to show a delivery to the innkeeper in order to charge him. Goods stolen from the chamber of the guest in the inn, the innkeeper having had no notice of them, will nevertheless render him liable. Nor would it divest of liability if the guest had himself the key of the chamber in which he lodged, and left the door open. But if the guest be required to put his goods in a particular chamber under lock and key, otherwise their safety would not be warranted, and it is not done, and they are stolen, the innkeeper is not responsible. The responsibility of the innkeeper extends also to his servants and domestics, and to those who are sojourning at the inn. The innkeeper ceases to be responsible if the guest takes upon himself exclusively the custody of his own goods, or if he has, by his own neglect, exposed them to the peril that results in their loss. Thus if he deposits them in a room, making use of it as a warehouse, having the exclusive possession of it, and they are stolen, the innkeeper is not responsible. *Farnworth v. Packwood*, 1 *Stark.* 249. Or if,

instead of confiding the goods to an innkeeper, he commits them exclusively to the custody of another person who is living at the inn; the innkeeper is not liable in case of loss. *Sneider v. Geiss*, 1 *Yeates*, 34.

§ 485. The extent of the innkeeper's responsibility for the goods of his guest is not yet entirely settled. He is not liable for trespasses committed upon the person of the guest, and was formerly held exonerated from losses occasioned by inevitable casualty, or by superior force, as by robbery. But the policy of the law has been steadily holding to a stricter degree of responsibility, until at the present time they are placed substantially upon the footing of common carriers, and held to be insurers of the goods of their guests except in case of loss by the act of God, and the public enemy. *Richmond v. Smith*, 8 *Barn. & Cress.* 9 *Mason v. Thompson*, 9 *Pick.* 280. The authority of this last case, however, is overruled in *Grinnel v. Cook*, 3 *Hill*, 485, so far as it holds the innkeeper responsible for the goods of a person who was not at the inn, and not, therefore, a guest. The character of guests must always be first established before the innkeeper can be held responsible for his property.

§ 486. Another point of interest and difficulty has arisen, and that is to determine what character of goods this extraordinary extent of liability shall attach to. Shall it be limited simply to the baggage a traveller ordinarily carries with him, or shall it embrace all goods he may have in his custody? There is a conflict in the cases upon this point. *The Berkshire Woollen Company v. Proctor*, 7 *Cush.* 417, holds, that the liability of the innkeeper for loss by his guest extends to all the movable goods and money which are placed within the inn, and is not restricted to such things and sums only, as are necessary for ordinary travelling convenience and expenses. But in *Simon v. Miller*, 7 *Louis.* 360, it is held that an innkeeper is responsible only for usual and ordinary baggage, and not for unknown treas-

ure belonging to the traveller. This may, therefore, still be regarded, to some extent, as an open question.

§ 487. One more topic only remains under this head, and that is the inquiry as to the burden of proof. The guest makes out his case by proving the defendant to be the keeper of a public inn, that he was there in the character of a guest, and that while there in such character, his goods, being baggage, were lost. The burden of proof is then upon the defendant, the fact of loss being itself presumptive evidence of negligence on the part of the innkeeper or of his domestics. He may show that the loss came within the excepted cases of the act of God or the public enemy; or that the guest was robbed by his own servant; or by one who came to the inn as his companion; or that the loss occurred through his own negligence.

#### QUESTIONS.

How is the contract of hiring defined? What does it cover? What does it include? Who are parties in the hire of things? What is the contract? What qualifications to the thing hired? What in regard to time and purpose? What must the thing be adapted to? What must be the right of the hirer? What is there to secure him this? What are the qualities of price? What essential as to the purpose for which the thing is to be used? What are the duties of the letter to hire? What the difference whether defects are known or unknown to him? What is the principle that governs repairs, and warranty against defects? What interest has the hirer in the thing? What has he purchased? What his duty as to employment of the thing? What the consequences of putting it to a different use or purpose? For whose benefit is this species of bailment? What is the hirer bound for? What will exonerate? When is there no liability? What illustration? What the rule as to restoration? And in what condition? How may this contract be terminated? What is another species of hiring? Where does this properly apply? What questions arise when the thing perishes or is destroyed? What does the risk of loss usually follow? How may the workman, by his contract, assume the risk of loss? How otherways may he assume such risk? For whose benefit is this contract? What should the law require? When is something beyond ordinary care and diligence required? What is the rule where the party professes the



skill, and undertakes for hire? What illustration? How does the skill and diligence required vary? What is the limit of requirement? What illustrated in? What is the rule of liability in surgical operations? What the standard of skill? What the rule when the person employed does not profess, and is known not to possess, the necessary skill and knowledge? When the work has failed through neglect of the bailee, what do his rights depend upon? What the rule if work is to be done by the day? What if done under an entire contract having special provisions? What illustration? What the principle extracted? What the principle as to the return of the identical thing?

How is an innkeeper defined? How is an inn defined? What is the difference between an innkeeper and a boarding-house keeper? How, in most of the States, are inns and taverns regulated? What does the license convey? How is it regarded? What not susceptible of? What is the difference between the guest at the inn, and the boarder at a boarding-house? Does length of time make any difference? How does a boarder or lodger become such? Does a guest become such by leaving goods at an inn? Are the innkeeper and boarding-house keeper alike as to rights, duties, &c.? What are those of boarding-house keeper governed by? What the duty of the innkeeper as to receiving and entertaining guests? What the result of improperly refusing? Who may he refuse to receive? To what does the principal contract with the innkeeper relate? What does it draw after it as accessorial? Will suspected persons at the inn justify him in refusing to take charge of baggage? Why? What was the principle settled in *Calve's case*? What in the more recent case of *Jones v. Tyler*? And in *Bennet v. Mellor*? Is it necessary to show delivery to the innkeeper to charge him? How when goods are stolen from chamber of guest? How if guest have the key? How can innkeeper render himself irresponsible? What does responsibility of innkeeper extend to? When does the innkeeper cease to be responsible? What illustrations? For what is an innkeeper not liable? What has been the policy of the law? On what footing is an innkeeper now placed, and how held? What is necessary before innkeeper can be held for goods? What is the limit of liability—is it limited to baggage or does it extend to money and goods? What must the guest prove to make out his case? Where is next the burden of proof? What is the fact of loss presumptive evidence of? What may the innkeeper show in defence?

## PART VII.

## OF THE COMMON CARRIER.

§ 488. A common carrier is one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place. Two necessary elements enter into the composition of the carrier.

1. He makes a continual offer to the public to carry all goods confided to him for that purpose, that come within his proposed line of business. It is this that renders him the *common* carrier. In this respect he differs from those who carry only when they make special contracts, and who do not offer themselves to the public to carry for all indiscriminately who choose to employ them.

2. He charges a reasonable compensation for the risks incurred, and the labor and services performed in the carriage of goods.

§ 489. There are, in this country, a great many different kinds of common carriers. But what serves to define them all, and set them apart from every other body of men, is, that they all carry for hire without entering into a special contract for that purpose. All truckmen, teamsters, cartmen, who make it their regular business and employment to carry goods from one part of a city or town to another, for the public generally, for a compensation, are common carriers. So, also, are the proprietors of stage-coaches, who carry goods for hire, holding themselves out to the public as ready to carry for all persons indifferently. The same principle applies also to the proprietors of railroad cars. Nor is it limited to land carriage. The *canal-boat*, carrying for the public, for hire, comes under the same principle. So, also, is the *steamboat*, when employed in the transportation of goods as well as persons for hire. But if employed solely in the transportation of passengers, it is otherwise. An interesting question has arisen in this country in regard

to the liability of a steamboat while employed in the towing of a freight vessel, and it was held that it was not a common carrier. *Eaton v. Rumney*, 13 *Wend.* 387; *Wells v. Steam Navigation Co.*, 2 *Comst.* 204. The point was for some time undecided whether *merchant vessels* employed in the transportation of goods beyond sea, were to be regarded as common carriers, until finally, after much consideration, it was held that they were, in *Morse v. Slue*, 1 *Ventris*, 190. The same doctrine is now understood to apply equally to vessels plying from port to port in carrying on the coasting trade, and also to bargemen and hoymen on a navigable river.

§ 490. Questions have frequently arisen in this country in cases where there are successive companies of carriers over a continuous line of travel, and no partnership relation existing between them. The point of difficulty to decide has been whether the carrier who receives the goods is liable for their loss in the course of their transit by another company. A package of goods marked for Chicago is delivered in New York to the Hudson River Tow-boat Company, who deliver it in good order to the New York Central Railroad, and while being carried from Albany to Buffalo, it is lost. Are the Hudson River Tow-boat Company liable? In England they would be liable. *Muschamp v. Lancaster & Preston Railway Company*, 8 *Mees. & Welsb.* 421. The early decisions in the State of New York adopted the English rule. *Weed v. Schenectady & Saratoga Railroad Co.*, 19 *Wend.* 534. At length *St. John v. Van Santford*, which was carried to the Court of Errors of the State of New York, and is reported in 6 *Hill*, 158, reversed the doctrine, and established the principle, that common carriers receiving goods to transport to a certain place, and at that place transferring them in the ordinary course of business to a responsible common carrier bound for or towards the place of destination of the goods, and they are lost after being so transferred, the first receivers are not responsible for

the loss. In the State of New York a statute passed in the case of railway carriers make the receiving company responsible, but gives it a remedy over against the company by whom the loss occurred. 2 *R. S.* 693, § 67, 5th *Ed.* But it is entirely competent for a number of different railroad lines running a continuous route, although different companies, and chartered by different States, to enter into an arrangement between themselves, by which, at either terminus, passage tickets are sold and baggage checked over all the roads, and any passenger receiving such check for the entire route, may, in case of loss, recover of the company of whom the ticket was purchased, and a company's agent selling a through ticket would render his company responsible in case of loss. And the validity of such contract will not be affected by the fact that it requires in its performance the action of other railroad companies incorporated by the acts of other States. *Cary v. The Cleveland & Toledo Railroad Co.*, 29 *Barb.* 35.

§ 491. A carrier of money may be equally liable for its loss as one of goods, if that be the common usage of the business in which he is engaged, and it is known to be his practice to take charge of it for conveyance. Thus the proprietors of a stage-coach acting as common carriers, and making a profit by the carriage of bank bills, that being within the scope of their business, were held liable for loss as common carriers. *Dwight v. Brewster*, 1 *Pick.* 50.

§ 492. Another point in regard to which there has been some diversity of decision relates to the carrier's liability for the usual baggage taken by travellers on board stage-coaches, railroad cars, and steam-boats. The early decisions were adverse to holding the common carrier responsible unless a distinct price was paid for it. *Middleton v. Fowler*, 1 *Salk.* 282. But the custody of the baggage finally came to be regarded as accessory to the principal contract, viz. the carriage of the passenger; and thus the liability of the carrier, as carrier for its safe carriage and delivery was clearly

established. *Hawkins v. Hoffman*, 6 Hill, 586. *Powell v. Myers*, 26 Wend. 591. This liability, however, is limited to ordinary baggage, such as travellers usually carry with them for their pleasure and personal convenience. A large sum of money carried in a trunk and lost, cannot be recovered under the term baggage. *Orange County Bank v. Brown*, 9 Wend. 85. There is also another limitation, and that is, the baggage must be placed under the charge of the carrier, for if it remains in the exclusive custody and possession of the passenger, the carrier is not responsible. *Cohen v. Frost*, 2 Duer, 335.

§ 493. The carrier, by reason of his employment, and the standing offer he is continually making to the public, to receive and carry all goods committed to him for that purpose, places himself under obligation, if his vehicle is not full, to act upon every acceptance of his offer, and thus to receive, for the purpose of transportation, all goods of the nature of those embraced in his line of business, which are tendered to him for that purpose. If he declines doing so, except because of his inability to carry them, or of their being a different kind of goods from those he is accustomed to carry, he renders himself liable to an action for damages. But the owner of the goods, when offered to the carrier, should be careful to tender, at the same time, the price of transportation; because the carrier is not legally bound to receive them without prepayment of his hire.

§ 494. The carrier's liability commences from that point at which there is a full and complete delivery of the goods to him to be carried; and where he directs them sent to a particular booking office, he becomes liable from the time of their arrival and receipt at the office. *Camden & Amboy Railroad and Transportation Co. v. Belknap*, 21 Wend. 354. The carrier's liability is fixed by the acceptance of the goods for the purpose of transportation, wherever that may be, but some kind of acceptance is indispensable, and hence when a passenger having placed his overcoat on the

seat of the car on which he sat, left it there, and it was afterwards stolen, it was held the carrier was not liable. *Tower v. Utica & Schenectady Railroad Co.*, 7 Hill, 47. It is a sufficient delivery to a canal-boat carrier to leave the goods by or near the boat, according to the usage of business, provided express notice thereof be given to the master. The delivery to an authorized servant or agent who is in the habit of receiving packages is sufficient. Evidence of a constant usage by the carrier to receive goods left at a certain place, will be sufficient to render him responsible for goods left at such place.

§ 495. Having determined who are common carriers, what are their obligations as to receiving goods to carry, and what acceptance charges them with the goods, the next point of inquiry relates to the liabilities they place themselves under, in the transportation and delivery of the property. The general principle may be stated to be: that the common law makes the common carrier liable as an insurer of the goods he transports against all loss and damage except what is caused by the act of God and the public enemy. "This," says Lord Holt, "is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons, that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner, as would not be possible to be discovered." This severe rule of liability has had its many cases of individual hardship, and many and strenuous have been the efforts under some form or pretence to escape from its pressure.

§ 496. The first point of inquiry that properly arises here, relates to the meaning of the phrase, "act of God." What is to be regarded strictly as "an act of God." It is held not to be identical with "inevitable accident," but has

been styled a "natural necessity," such as storms, winds, &c. The clearest idea may probably be got of it in its legal sense, as applying to common carriers, by considering it as meaning *something in opposition to the act of man*. And in all cases of loss where the agent of destruction has clearly been something that no human power has produced, or set in motion, it is then to be attributed to the "act of God." Some illustrations will point the application of this proposition. There is a sudden failure of the wind by means of which a vessel tacking is unable to change her tack, and so is driven ashore. Held, an "act of God." *Colt v. McMahan*, 6 John. 160.

Goods are burnt in a booth, the fire having originated one hundred yards' distance, and no negligence proved against the defendant. Held, that the fire arose from an act of man, and the carrier was liable. *Forward v. Pittard*, 1 Term. Rep. 27.

Destruction by lightning, and the freezing of canals and rivers, are regarded as "acts of God." The rule is to render the carrier liable *wherever the act of man is traceable*, and hence where an injury was done to a cargo by the steam which escaped through a crack in the steam boiler occasioned by the frost, the carrier was held liable.

§ 497. The phrase "perils of the seas," often occurs and is used as synonymous with "acts of God." It includes losses by pirates, and by collision of vessels where no blame is imputable to the injured ship. The phrase "dangers of the river," has also come up, and has been considered by some as embracing the same as "perils of the seas," while by others it has been regarded as more extensive, covering losses occasioned by hidden obstructions, newly placed there, and of a character such that human skill or foresight could not have discovered or avoided. *Gordon v. Buchanan*, 5 Yerg. 71.

§ 498. A common carrier may become liable for an injury caused by an "act of God," if he voluntarily and improperly encounters the mischief; as where a barge mas-

ter rashly shoots a bridge when the bent of the weather is tempestuous, and a loss occurs in consequence. *Amies v. Stevens*, 1 *Strange*, 128. So a loss occurring in consequence of a deviation from the regular course of a voyage at sea will subject to liability; as where the navigation of Long Island Sound, being obstructed by ice, the carrier vessel, instead of going through it, performed her voyage in the open sea, on the south side of Long Island. This was held a deviation which rendered the carrier liable for a loss occasioned by the perils of the sea; but the court distinguishes between this and the case of a vessel already on her voyage, and while *in transitu* is compelled by a like obstruction to deviate from her course. *Crosby v. Fitch*, 12 *Conn.* 410. So, also, a railroad corporation is held responsible for damages resulting from a delay to transport freight in the usual time which was caused by a great number of its servants suddenly and wrongfully refusing to work. As where a large proportion of the engineers on a railroad, suddenly and by concert abandon their engines for the purpose of compelling the company to rescind a reasonable regulation. *Blackstock v. The New York & Erie Railroad Co.*, 20 *New York Rep.* 481.

And so also where there was a failure to transport a passenger with proper despatch, owing to the *wilful act* of the conductor in charge of the train; it being held wholly immaterial whether a breach of contract results from the negligence or the wilfulness of the carrier's agent if his act is within the scope of his employment and authority. *Weed v. The Panama Railroad Co.*, 17 *New York Rep.* 362.

§ 499. The other exception is that of the "public enemy," which is restricted to enemies with which the State is at war, and to pirates on the high seas; these latter being considered the enemies of all mankind. It does not apply to losses occasioned by thieves, rioters, robbers, armed mobs, or insurgents. The carrier is in all cases liable unless the loss has arisen through the operation of one of these two



causes, the proof of which in exoneration always lies upon the carrier. The merchant or owner shows the delivery to him to carry, and that they never reached the consignee, or even stopping with the delivery will charge the carrier with the goods, and devolve upon him the necessity of showing something in discharge. If a loss occurred through either of the causes specified he is bound to show it, or, if he does not, to stand the loss. If the loss must have happened to goods on board a vessel without the misconduct by which it was occasioned, the common carrier would not be held liable. As where goods were improperly stowed on the deck of a ship, and are washed away by the storm. The owner of the ship held liable for the loss, although caused by the perils of the sea, *unless* the danger were such, as would equally have occasioned the loss, if the goods had been safely stowed under deck. *Crane v. The Rebecca*, 6 *Am. Jurist*. 1.

§ 500. A question has been raised as to the liability of the carrier when he enters upon the carriage of animals, and a loss occurs. He was formerly held responsible in the same manner as a carrier of merchandise. *Stuart v. Crawley*, 2 *Stark*. 323. The point has recently come up in the Court of Appeals of the State of New York in the case of *Clarke v. The Rochester & Syracuse Railroad Co.* 4 *Kern*. 570, in which it was held that the liability of a common carrier of animals is not, in all respects, the same as that of a carrier of inanimate property. But the liability of a railroad company, engaged as a common carrier of animals, is not limited to the careful and safe conveyance of the car containing them. The company is responsible for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of the animals. But he is not an insurer against injuries arising from the nature and properties of the animals, and which diligent care cannot prevent.

§ 501. The strictness, extent, and severity of the com-

mon carrier's liability has led to frequent attempts on his part, to limit, restrict, qualify, or restrain it, which have generally been ultimately successful. It seems to have been early conceded in England that the right was possessed of making special acceptances in limitation of liability. In this country the point has several times been presented, generally in the form of a notice given to the passenger that "all baggage was at the risk of the owner," and in such cases the law was very clearly settled that the carrier's liability was not thereby restricted. *Hollister v. Nolen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. *Gould v. Hill*, 2 Hill, 623. At the same time several dicta of the judges went to the extent of denying that, upon grounds of public policy, the common carrier could, *by any means whatever*, limit a responsibility which the law, for wise reasons, had cast upon him. The question finally went to the Court of Appeals of the State of New York in *Dorr v. The New Jersey Steam Navigation Company*, 1 Kern. 485, in which it was held that although a notice brought home to the other party would not have the effect of restricting liability, yet that it was competent for the common carrier, *by entering into a special contract*, to limit it within narrower bounds than those prescribed by the law. The power of limiting by a special contract, stands now, therefore, admitted, but that by notice, though brought to the knowledge of the owner, denied. But ought not the latter to be evidence of such a special acceptance as, under the English decisions, would amount to a limitation? In States other than New York, the decision has, in many instances, been adverse to the right of the carrier to limit his common law liability. *Jones v. Voorhees*, 10 Ohio, 145. *Fish v. Ross*, 2 Kelly (Georgia), 349. *Bennett v. Dutton*, 10 N. Hampshire, 481. The question seems never to have caused any difficulty, except as it related to carriers by land. Carriage by water has been accompanied by a bill of lading, specifying the risks from which the carrier chose to exempt himself, and this has

been held to be a special contract, and to afford protection. *Swindler v. Millard*, 2 *Rich. (S. C.)* 286.

§ 502. There are, however, cases in which the carrier may limit his liability by a general notice. The ordinary run or character of the goods he is accustomed to carry, is generally known in the community among whom his business is carried on, and he may give a general notice that he will not be answerable for goods of a different description, and higher value, such as money and jewelry; or that if he undertakes the carriage of them, he shall be paid a higher compensation. Thus the courts say: "that if the carrier has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner, is as effectual in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium." *Orange County Bank v. Brown*, 9 *Wend.* 85-115.

§ 503. But while the carrier is held to this extreme liability, the owner of goods is very properly placed by the law under obligations not to practice upon him any misrepresentation, fraud, or concealment of any kind. He must do or say nothing tending in any way to mislead. The adopting any disguise for his box, the labelling it as containing articles of a different nature and inferior value from its real contents, will prevent a recovery in case of loss. A traveller's trunk is lost containing \$11,250 in money. It was sought to be recovered as *baggage*. Held, that it did not fall within the commonly received import of the term "*baggage*," and that an attempt to have it carried free of reward, under cover of "*baggage*," was an imposition upon the carrier; that he was thereby deprived of his just compensation, besides being subjected to unknown hazards. *Orange County Bank v. Brown*, 9 *Wend.* 85.

§ 504. In the absence of all notice, and of all disguise

or concealment, the question has arisen whether it devolves upon the owner to disclose the superior value contained in a trunk or box, or whether it is the business and duty of the carrier to inquire, or to be chargeable for the full value if he does not. The latter may be regarded as the correct doctrine. *Walker v. Jackson*, 10 *Mees. & Welsb.* 161. The further question has also been presented, whether the giving of notice has the effect of preventing the necessity of making inquiries on the part of the carrier, thus shifting the responsibility to the owner, and devolving upon him the obligation to disclose in accordance with the notice he has received, or whether the carrier is still bound to inquire; and the rule is settled in accordance with the doctrine first mentioned. *Brook v. Pickwick*, 4 *Bing.* 218. *Orange County Bank v. Brown*, 9 *Wend.* 85-115.

§ 505. Another inquiry here arising relates to the liability of the carrier, supposing he has protected himself by notice brought home to the owner. In other words, against what is the notice a protection? The answer is that it protects him only against his extraordinary liability as a carrier. The owner of lost goods may still aver and prove that the loss was caused by *negligence*, and *that* even of the ordinary character; and the carrier will be liable, for proof of negligence is held to be an answer to proof of notice. Neither will the notice protect the carrier from a *misfeasance*, as the delivery of goods at a wrong place, or to a wrong person; or the sending of them by a different conveyance from that stipulated, by means of which they are lost. Neither will a notice dispense with the performance on the part of the carrier of any *implied duty*, and hence if a loss were to occur in consequence of the vessel not being reasonably stout, strong, and well equipped for the voyage, the carrier will be held liable notwithstanding the notice. In all these cases, however, the giving of notice shifts the burden of proof from the carrier to the owner of the goods, who must then show the negligence or misfeasance, or non-

performance of duty, upon the strength of which he still claims to recover.

§ 506. Having seen how the common carrier of goods is charged by their delivery and acceptance; what are his common law liabilities; how he may vary, modify, or restrict them; and what residuum of liability still remains, notwithstanding such modification or restriction; it will be next in order to inquire how he can entirely discharge himself from all liability. This is accomplished by the delivery of the goods to the consignee. This raises the inquiry, what is necessary to constitute a complete delivery, such as will determine the transit? And first in regard to time. The rule is that when no time is fixed upon for the transit, a *reasonable time* is implied, and that the carrier is bound to make a proper delivery with *reasonable expedition*. What that is, must be governed by the circumstances of each particular case. Another question relates to the damages to which the carrier is liable if he fail to deliver within a reasonable time. An account good when delivered to the carrier is barred by the statute of limitations when delivered to the consignee. Held, the carrier was liable. *Tavor v. Philbrick*, 7 *N. Hamp.* 326. The omission to deliver within a reasonable time does not render the carrier liable for the value of the article. He is only liable for damages caused by such omission. *Scovill v. Griffith*, 2 *Kern.* 509. Where there is no express agreement in relation to time of transportation, the carrier is not responsible for delays occurring without his default. *Wibert v. The New York & Erie Railroad Co.*, 2 *Kern.* 245. The consignee is under no obligation to receive goods tendered late in the day, and after he has dismissed his hands; and if a subsequent loss occurs, the carrier will be responsible. *Eagle v. White*, 6 *Whart. (Penn.)* 505.

§ 507. The carrier's contract to deliver may be suspended by some temporary unavoidable obstacle, and yet, if he has used a reasonable degree of exertion and diligence in the

transportation, he will be excused. A carrier on the canal is prevented by reason of ice, from accomplishing, without serious detention, the whole voyage. He is only bound to deliver at the place appointed, upon the canal again becoming navigable. *Parsons v. Hardy*, 14 *Wend.* 215. So, also, the delay occasioned by the disordered condition of a lock, would have the same effect. But where there is an express contract to deliver within a certain prescribed time, no temporary obstruction will be any defence, but he is held strictly to the performance of his contract. The occurrence of inevitable necessity in such case will constitute no excuse.

§ 508. As to person and place of delivery, when the carriage is by land, in the absence of any special contract or established usage to the contrary, the goods must be carried to the residence of the consignee. To serve as a perfect protection to the carrier, the tender of delivery should be to the individual consignee at his residence or place of business, and hence where the goods were delivered to a porter at the inn, it was held insufficient. *Hyde v. Trent & Mersey Navigation Company*, 5 *Term. Rep.* 389. The delivery of the goods according to the label upon them will always discharge the carrier. The consignee may take possession before they arrive at their place of destination, and that will discharge the carrier. But although the delivery should be to the consignee at his residence or place of business, yet the carrier may, in exoneration, prove that his uniform usage and course of business is to leave goods at his usual stopping places in the towns to which the goods are directed, *without notice to the consignees*, provided such usage be shown of so long continuance, uniformity, and notoriety, as to justify a jury in finding it was known to the owner. *Gibson v. Culver*, 17 *Wend.* 305. The delivery of money at the banking office to a person usually employed as a porter at the bank is insufficient unless authorized by the bank, and such authority may be either express or implied. *Sweet v. Barney*, 24 *Barb.* 533.

§ 509. The question of sufficiency of delivery has come up, perhaps, the most frequently in cases of carriage by water. Here, although usage may be urged in defence of it, a delivery by placing goods on the wharf, without any notice to the consignee, is held insufficient. To render the delivery complete, notice should be given to the consignee, and after that, the carrier still continues liable until the consignee has had a reasonable time to remove the goods. *Moses v. B. & M. R. R. Co.*, 32 *N. Hamp.* 523.

§ 510. The question arises what becomes the duty of the carrier, in case the consignee is dead, or absent, or refuses to receive the goods. He is still charged with them, and will not be justified in leaving them on the wharf unprotected, or in abandoning them in any other way. He may, in such case, relieve himself of them, by placing them in store with a responsible person in the same business as the consignee, at the place of their consignment; and the person so receiving them, becomes the agent or bailee of the owner of the property. *Fisk v. Newton*, 1 *Denio*, 45.

§ 511. This branch of the subject is very properly closed by inquiring *what will excuse a non-delivery of goods by the carrier*. He is excused where the loss occurs—

1. From an act of God.
2. From that of a public enemy.
3. Where the goods have been necessarily thrown overboard to preserve the lives of the crew and passengers.
4. Where the loss has been occasioned by the illegal act of the shipper.
5. Where, by agreement, there is a discharge from further responsibility.
6. Their delivery at the place of their original destination is excused by receiving subsequent directions as to the place of delivery. Or they may be accepted short of their original place of destination.
7. Where the owner accompanies them, having their exclusive custody.

8. When they are stopped in transitu by the act of the vendor, or consignor.

§ 512. The carrier's right should be co-extensive with his severe liabilities. He has a special property in the goods he transports. This enables him to sustain an action against any person disturbing his possession. This is grounded upon two reasons: One the interest he has in the transportation, the other his responsibility to the owner for their injury or loss. But he enjoys no absolute right of property in the goods, and hence is unable to give any title in them to another either by way of sale, pledge, or mortgage. A carrier having purchased a boat, deposited, as security for its price, a part of his load of salt with the vendor. Held, the latter acquired no right against the owner of the salt. *Kitchell v. Vanador*, 1 *Black.* 356. The right of giving bottomry and respondentia bonds, grows, as we have seen, out of necessity, and the peculiar circumstances of the case.

§ 513. The carrier's right is to his compensation, and to resort to all the legal means by which he may become possessed of it. These means are two-fold—the one by enforcing his lien upon the goods, the other by proceeding personally against the owner. The first will be considered in the next book. The last is an action brought in a court of law to recover his freight, or price of hire, of the owner or employer. This only becomes necessary when he has voluntarily relinquished the possession of the goods, for until then, his right of lien gives him a perfect remedy. The carrier may, if he chooses, demand the payment of his freight in advance. But if he waives that right, he must fully earn it before he can resort to other means to possess himself of it. The contract which gives him the right to claim it is an entire one and indivisible, and must, therefore, be wholly performed, before any thing can be recovered. It is the price of *carriage*, and not simply of receiving goods *to be carried*. Even the arrival of the goods at their place of



destination did not entitle the carrier to his freight. They must, in addition, be delivered, or be in a condition to be. But if the delivery is prevented by the act of the owner, or even by the act of the government, the freight will be considered as earned. The carrier loses his freight by the capture of his vessel, but in case of re-capture, performance of the voyage and delivery, or offer to do so, his right becomes perfect. This is upon the principle that he ought not to lose his freight in consequence of an interruption of the voyage without any fault of his; and so if the goods be thrown overboard for the ship's preservation, the owner of the goods must pay freight, and seek his repayment by a general average.

§ 514. As to the person to whom the carrier looks for his freight where he is obliged to recover it by action, it is ordinarily the party with whom he made the contract to carry the goods. When, however, the goods are to be delivered to the consignee on payment of freight; or, if by the bill of lading, the goods are to be delivered to A, or his assigns, he or they paying freight, and the goods are received under it, that constitutes an implied undertaking, and the carrier can look to him or them for the freight. But if, upon the face of the bill, it is apparent that the consignee is a mere agent, his receipt of them will subject him to no personal liability. And if there is a mere receipt of goods under a bill of lading, the law, it seems, will not imply a promise from an indorser to pay the freight, although a jury are at liberty from such fact to find such a promise; unless the charter-party contains an express contract by the charterer to pay freight, which is referred to in the bill of lading. It is held requisite that the ship break ground, to give inception to freight; and hence, if the ship be laden and captured before breaking ground, and afterwards re-captured, but the voyage broken up, no freight is earned. But after breaking ground, a temporary restraint, such as an embargo, which suspends, for a time, the performance of the voyage,

leaves the rights of the parties unaffected. The same principle applies to a blockade or hostile investment of the port of departure. The carrier, in such case, may wait until the obstacle is removed, (the same as if navigation had been obstructed by ice,) and then proceed in the prosecution of his voyage. *Palmer v. Lorillard*, 16 *John.* 348.

§ 515. A question has been raised, whether, in case the cargo becomes greatly deteriorated during the voyage, the consignee is obliged to receive it; or whether it may be abandoned in discharge of the freight. The ground upon which the right thus to abandon is claimed, is, that the cargo is the only proper fund and pledge for the freight. It is now, however, well settled, that no such right exists; that when the carrier has completed the carriage of his cargo, and is ready to deliver it, he has performed all the conditions upon which his right to his freight depends, and that upon no principle can it be claimed that he is an insurer of the soundness of the cargo, as against the perils of the sea, or its own inherent decay. *Griswold v. The New York Insurance Company*, 3 *John.* 321.

§ 516. Another question often presenting itself, regards the rights of the carrier to recover freight for the transportation of animals that have died on their passage without his fault or negligence. This question is settled by referring to the nature and terms of the agreement. If the agreement be to pay freight for the *lading* of the animals, that is accomplished by receiving them on board, and their death on the passage cannot deprive the carrier of his freight. If it be for the *transportation* of them, that is not performed until their arrival at the place of destination; and if they die in transit, the freight is not earned. But if neither of these, or any corresponding terms are used, and there is no express agreement respecting the payment of freight, the general rule is that freight is recoverable whether they live or die during the voyage.

§ 517. Another question has arisen out of the foreign

marine law, which allows freight paid in advance to be recovered back, if the goods are not carried, nor the voyage performed, by reason of any event not imputable to the shipper. This is obviously the equitable doctrine, as the consideration for payment, which was the carriage of the goods, has utterly failed. But the rule settled in reference to it in England and in this country is entirely different. The English rule is that if the charter-party is silent, the law will require a performance of the voyage before the freight becomes due, but that the parties may stipulate that part of the freight be paid in anticipation, and be made free from subsequent contingency of loss, by reason of abandonment of the subsequent voyage. That to enable a recovery back of any freight thus paid in advance, a stipulation to that effect between the parties is necessary. *De Silvale v. Kendall*, 4 *Maule & Selw.* 37. Our rule is directly the reverse; requiring a stipulation that the freight paid in advance is *not to be returned* if the voyage be not performed, *otherwise the shipper may recover it back.* *Pitman v. Hooper*, 3 *Sum.* 50.

§ 518. Another question relates to part-payment, or the right to ratable freight, which may arise in two cases—one, where the ship has performed the whole voyage, having brought only a part of her cargo to the place of destination, and the other where she has not performed her whole voyage, the owner having received his goods at some port short of that of delivery. The first occurs in the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods. Freight is then due only for what the ship delivers. But suppose the ship is chartered at a specific sum for the voyage, and a part of her cargo is lost by a peril of the sea, and hence a part only is delivered, can there, in such case, be an apportionment of the freight? The contract is then regarded as entire, and the delivery of the whole cargo a condition precedent to the recovery of freight. It is the whole or nothing. This, however, presents

a case of great hardship, and if any circumstances were apparent, from which a new contract to pay freight *pro rata* might be inferred, such, for instance, as an acceptance by the freighter of the remaining portion of the cargo, relief would probably be afforded.

§ 519. An interesting case presents itself where the carrier vessel is forced into a port short of its destination, and is unable to finish the voyage. Then, if reasonable time is allowed to repair, or for the carrier to proceed in another ship, he will be entitled to the whole freight. But if the owner of the cargo consents, and the carrier refuses to go on, he is not entitled to freight, because he refuses to earn it. But the carrier, in order to entitle himself to freight, ought to repair his vessel, or obtain another one and proceed, or offer to do so, and if so he proceeds through the remainder of the voyage the same as if no suspension of it had occurred. But the merchant or owner may, if he choose, receive the cargo at the port of necessity, and in that case there occurs what is termed an *apportionment of freight*; that is, freight ascertained from a calculation of the proportion of the voyage performed. The conditions of this apportionment are: 1st, that the ship and cargo be forced into a port short of its ultimate destination by necessity, and be unable to prosecute the voyage, and 2d, that the cargo be there voluntarily accepted by the owner. *Luke v. Lyde*, 2 Burr. 882.

§ 520. The common carrier is not held to the same severe liability for injuries that occur to passengers, as for damage and loss to property, as he cannot exercise the same control over persons as he can over inanimate objects. He is under legal obligations to receive all persons applying for a passage, provided he have sufficient room, and the passenger pay or tender the fare. The passenger carrier is also bound to provide means and vehicles of carriage reasonably strong, and entirely adequate for the purpose intended. If there is any defect in the original construction of a stage-coach or

railroad car, although out of sight, yet if it be discoverable on the most minute examination, and any damage is thereby occasioned to the passenger, the carrier will be answerable. He is bound to adopt all practicable improvements tending to insure the safety of passengers, and, if he fail to do so, he is liable. And hence, where a passenger in a railroad car was injured by the breaking of one of the axles in consequence of a latent defect which could not be discovered by the most vigilant external examination, and yet the manufacturer by resorting to the test of bending the iron after the axle was formed, and before its connection with the wheel, might have discovered the defect, the company were held liable; the doctrine established being, that the passenger carrier is liable, although the defect be latent and not discoverable by the most vigilant external examination, *provided it be ascertainable by any known test whether it be such as is applied by the manufacturer or the carrier.* *Hege-man v. The Western Railroad Corporation*, 3 Kern. 9.

§ 521. The passenger carrier is bound to carry his passengers *safely* and *properly*, and is liable for all consequences resulting from the want of such care as the person, under the circumstances of the case, may require. His liability is much the same as that of a special carrier of goods for hire. He is answerable for the want of due care, diligence, and skill; and hence where an injury occurs to the person of a passenger by mere accident, without any fault on his part, he is not responsible. *Bennett v. Dutton*, 10 N. Hamp. 481.

§ 522. It is the right of the passenger carrier to prescribe all reasonable rules and regulations which are proper, and which are essential to aid him in the performance of his undertaking; and hence where a railroad company made a regulation requiring the passengers, soon after entering the cars, to give up their tickets, receiving checks in exchange, and a passenger, on demand, refuses to deliver up his ticket, it was held that the conductor might demand the payment of

his fare, and on refusal, eject him from the cars. *Northern Railroad Co. v. Page*, 22 Barb. 130. And so, also, a regulation requiring passengers to exhibit their tickets whenever required by the conductor, and directing the ejection from their cars of those who should refuse to do so, has been held a reasonable and proper regulation, and one that the passengers must obey, or forfeit the right to their further carriage. *Hibbard v. The New York & Erie Railroad Co.*, 15 *New York Rep.* 455.

§ 523. The question has arisen how far it was competent for the passenger carrier to limit his liability for injuries to the person, and it has been held that he may, by positive stipulation, relieve himself to a limited extent, from the consequences of his own negligence or of that of his servants. But that, in order to accomplish this object, the contract must be clear and explicit in its terms, and plainly covering such a case. Hence a drover's pass containing a provision that "the persons riding free, to take charge of the stock, do so at their own risk of personal injury, from whatever cause," does not exempt the carrier from liability for gross negligence, or for the want of ordinary care. That he is still liable for what would be regarded as a fault or misconduct on his part, independent of any peculiar responsibility attached to his calling or employment; and that he is bound to observe reasonable care and precaution, employ persons of requisite skill, and possess vehicles fit for use, and adapted to the nature of the service required. *Smith v. The New York Central Railroad Co.*, 29 Barb. 132.

§ 524. The passenger carrier, if a stage-coach proprietor, will be liable for any injury occasioned by the racing of the driver against other coaches, and the upsetting of the coach is taken to be sufficient *prima facie* evidence of negligence to shift upon the carrier the burden of proof to show circumstances such as negative all negligence on his part. *Peck and wife v. Niel*, 3 *McLean*, 22. And his liability will be the same although the injury result from the passen-

ger's own act, as by leaping from the vehicle, provided the state of peril will justify it. *Stokes v. Saltenstall*, 13 *Peters*, 181. In the case of collision between two carriages, the employer of the driver, by whose negligence or misconduct it occurred, must be responsible for the consequences. But the rule is that if the plaintiff's negligence *in any way concurred* in causing the damage, he is not entitled to recover. He must not appeal to the law for redress when he is himself at fault; and hence where one was injured by an obstruction in a highway against which he fell, it was held that he could not maintain an action if it appeared that he was riding with great violence and want of ordinary care, without which he might have seen and avoided it. *Butterfield v. Forester*, 11 *East*. 60.

But although there may have been negligence on the part of the plaintiff, yet the rule is understood to be, that he is entitled to recover unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. The burden of proof is here devolved upon the carrier, and he is bound to show that there has been no disregard of his duties, and that the damage has resulted from a cause which human care and foresight could not prevent.

#### QUESTIONS.

Who is a common carrier? What two elements enter into his composition? What serves to define the different kinds of carriers? Enumerate them. Where there are successive companies over a continuous line of travel and no partnership, what is the liability and duty of the receiving carrier? What illustration? What the statutory provision? What can be made matter of agreement as to carrying through the entire route? When is a carrier liable for loss of money? What is a carrier's liability for baggage? On what principle is he liable? What is the limitation? Under whose charge must the baggage be? What is the carrier's duty as to receiving goods? When can he decline? What must the owner do, when offering them for carriage? What the carrier's liability if he declines receiving them? When does the carrier's liability commence? By what is it fixed? What is indispensable to render him

liable? What is a sufficient delivery to a canal-boat carrier? What instance of usage as to place? What is the carrier's liability? How does the law regard him? For what reason? What is an act of God? How as to its equivalency with "inevitable accident?" How with "natural necessity?" When is it clearly an act of God, and to what is it in opposition? What illustration? How is the phrase "perils of the seas," used? What does it include? How is "dangers of the river" considered? Can a common carrier become liable for an injury caused by an act of God? In what manner? What other instance? What case of liability from delay? What from failure to transport passenger, arising from wilful act of conductor? How is a public enemy defined? What does it include? What does it exclude? Where is the burden of proof? What does the owner show to make out his case? What then devolves upon the carrier? What if the loss must have happened without the misconduct which occasioned it? What illustration? What is the limitation to the carrier's responsibility in the transportation of animals? Can a common carrier restrict his common law liability? How? Can restriction be accomplished by notice? Are there any cases in which a common carrier can limit his liability by a general notice? Under what circumstances? Under what obligation is the owner of the goods? What will prevent a recovery in case of loss? What illustration? Where there is no notice and no concealment, on whom does it devolve to inquire? What effect does the giving of notice have on the carrier as to his duty of inquiring? Against what is the notice a protection? May the owner of lost goods still recover, and in what cases? Does a notice dispense with any implied duty? What effect has the giving of notice in shifting the burden of proof? How does the carrier discharge himself from all liability? When no time is fixed for the transit, what time is implied? When must the carrier make delivery? What does the omission of the carrier to deliver within a reasonable time, subject him to? When not responsible for delays occurring without his default? When is consignee under no obligation to receive goods? How may carrier's contract to deliver be suspended? And when may he be excused? What illustration in case of carrier on the canal? What bound to do? What delay otherwise, and how occasioned will have same effect? How is it, where there is an express contract to deliver? To whom must the delivery be made? And at what place? In what manner delivered when labelled? When may consignee take possession? How may the usage and course of business of the carrier justify a delivery? And what kind of usage? What illustration as to delivery of money? How are goods carried by water delivered? What is the carrier to do, when he finds the consignee dead, absent,



or refusing to receive? When is the carrier excused for not delivering? Has the carrier any property, and what, in the goods he transports? What does this enable him to do? What grounded upon? Can he give any title to the goods he carries to another? What illustration? What is the carrier's right? What means has he of enforcing it? When only does an action become necessary to recover his freight? What may the carrier do? What, supposing he waives that right? What is the character of his contract? What necessary as to performance? What is freight the price of? What is necessary beyond carriage of goods? What if delivery be prevented by act of the owner or of the Government? What the rule in case of capture? What of recapture, performance, and delivery? How if goods be thrown overboard? To whom does the carrier look for his freight? How when goods are delivered to consignee on payment of freight? How where to be delivered to A or assigns, paying freight? How where it is apparent that consignee is a mere agent? How where there is mere receipt of goods under bill of lading? What is necessary to give inception to freight? What result of this? After breaking ground, what the effect of restraint, such as embargo or blockade? Can the cargo be abandoned in payment of freight? How is it with claim for freight of animals that have died on their passage? What the different rules on this subject? Under what circumstances can freight paid in advance, be recovered back? What is the English rule on this subject? What the American? What is the first instance mentioned in which freight *pro rata* can be paid? What the second? In what case does the first occur? What the rule where ship is chartered at a specific sum for the voyage, and a part of her cargo lost by a peril of the sea? What circumstance might prevent this? What occurs where carrier vessel is forced into a port by necessity and is unable to finish the voyage? How may carrier then lose his right to freight? What must carrier then do, to entitle himself to freight? When, and what, is apportionment of freight? What are its conditions? Is carrier's liability for injury to passengers the same as for loss of property? What his obligations as to receiving passengers? What is he bound to provide? What if there be defect in construction of stage-coach or railroad car? What is he bound to adopt as to improvements? Is he ever answerable where defect is not discoverable? When, and under what circumstances? How is passenger carrier bound to carry his passengers? What is he liable for? What does his liability resemble? What answerable for? Under what circumstances not responsible? What the right of passenger carrier as to prescribing rules and regulations? What illustrations? Can a passenger carrier limit his liability for injuries? By what means? How must contract

be to have such effect? What illustration? What limitation to his right of restraint? What is he still liable for, notwithstanding the limitation? What is he bound to observe, whom to employ, and what to possess? What act of driver is stage-coach proprietor liable for? What is upsetting of coach *prima facie* evidence of? Where is the burden of proof? How if injury resulted from passenger's own act? Who liable in case of collision of carriages? What is the rule where the plaintiff is guilty of negligence? What illustration? When is plaintiff entitled to recover, although negligent? Where is the burden of proof?

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### CHAPTER III.

#### CONTRACT OF INSURANCE OR OF INDEMNITY FOR LOSS.

The conviction of the safety of material acquisitions constitutes an element both of enjoyment to the man, and of credit to the merchant. As the agents of destruction are numerous, complicated, and ever active, it can excite no surprise that men of prudent, cautious habits, should seek an indemnity against the losses they must necessarily occasion. This they have found in contracting with the insurer, who, after a wide survey of the causes of damage and loss as affecting both property and life, has been enabled to deduce from what was apparently the play of chance, a sufficient degree of certainty; and from the laws of disorder, a profounder law dispensing order; and is therefore willing, for a sufficient consideration, to take upon himself all the risks to which either property or life may be subjected. Whether in process of time the knowledge of facts, and the deductions of science, may not annihilate what now seems to be chance, and render so well known to every mind the causes and occasions of loss, and the means of avoidance, as to dispense entirely with this great department of the law, is among the unsolved problems of the future. At present, however, it must be admitted that it occupies a very important position in the body of commercial law.

There are three kinds of insurance, MARINE, FIRE, and LIFE, to each one of which some consideration must be devoted. All these, however, are grounded and bottomed upon the same principle, viz.: that of INDEMNITY—the *agreement in advance to make good a possible loss*.

## I. MARINE INSURANCE.

### PART I.

#### NATURE OF CONTRACT, AND PARTIES.

§ 525. Marine Insurance is expressed by a contract in which one party, for a stipulated consideration, agrees to indemnify the other against certain perils to which his ship, freight, cargo, and profits, or some of them, may be exposed, during a certain voyage, or a fixed period of time. In this, as in the other branches of insurance, the party insuring is called the *insurer*, or very commonly in marine insurance, the *underwriter*. The party indemnified is termed the *insured* or *assured*. The instrument embodying the contract is termed the *policy of insurance*. This contract is strictly one of indemnity. The insurer undertakes, in the event of loss, to pay the assured either such value of the property insured as may be stipulated in the policy, or, if not so stipulated, such as may be legally ascertained. It is entirely competent to make an agreement for an insurance, to be afterwards carried out by the execution of a policy; and whenever this is done, a refusal to execute will give a Court of Equity jurisdiction to decree specific performance, or even a remedy at law to recover in case of loss.

§ 526. In regard to parties, the common law rule is, that individuals, and partnerships or companies, may become insurers; although practically the amount of capital required for that purpose, and some other considerations, has resulted in rendering companies mostly insurers in all the risks taken. And those companies are corporations either specially cre-

ated by the legislature, or who have become such under a general act passed for that purpose. In regard to the party insured, the question has arisen whether the insurance of an enemy's property is legal, and, in case of loss, enforceable at law. It may now be considered settled both in England and in this country, that no such insurances can be sustained. *Bristow v. Towers*, 6 *Term Rep.* 35. *Griswold v. Waddington*, 16 *John.* 438. With that exception, any person, whether American or alien, may be insured. Practically subscriptions to policies are usually procured through a *broker*, to whom the insurer looks for his premium, and who occupies the position of a middleman between the underwriter and the assured.

### QUESTIONS.

What is Marine Insurance? What the names of the parties to the contract? What the name of the instrument? What is this contract one of? What is the effect of an agreement for an insurance? How is such enforceable? Who may be insurers? Who are generally insurers, and why? Whence derive their existence and capacity? Is insurance of an enemy's property legal? What other parties may be insured? Who, practically, is the party through whom insurances are effected?

## PART II.

### SUBJECT-MATTER AND INSURABLE INTERESTS.

§ 527. The subject-matter insured must distinctly appear in the policy, and, as a general thing, is limited to what is therein stated. If a ship is specified, it becomes a part of the contract, and admits no substitution of another without necessity. But a cargo, being of less easy identification, may be shifted from one ship to another, and the insurer, if done for a sufficient reason, will still be liable. The body of the ship being insured will include all its appurtenances. It covers all the legal interest in the vessel. A cargo may be legally insured without naming the ship; as when the insurance is upon goods on board *any ship or ships*. But

this is a loose mode of insuring, and in case of loss, sometimes subjects to great inconvenience in discriminating between goods covered by different policies.

§ 528. The words *lost or not lost*, as applied to the subject-matter insured, are generally contained in a policy. This phrase is inserted to cover any loss of the property insured which may have happened at or before the time of entering into the contract, and of which the parties were at the time ignorant. The phrase, however, is not deemed necessary for that purpose, as without it all losses then existing, of which the parties were ignorant, would be covered by the insurance.

§ 529. A voyage from abroad may be insured with very little of the specific in description, and yet be sufficient. This often happens from necessity. The party wishing to insure may be ignorant of the name of the ship, or master, or port of discharge, or consignee, or of the nature or species of the cargo, and may not be able, therefore, to specify any of these; and in such case the insurance will be good for the amount, if effects be laden in any ship, to any port, and to any consignee. But the cargo must be of the same form and species as that insured, as an insurance upon a cargo of dry goods would not cover a cargo of wheat.

§ 530. The subject-matter insured, whether a voyage or a cargo, must be legal; and if there is any illegality in the commencement of a voyage, it will render the whole illegal; but if the voyage, as originally insured, be lawful, a subsequent illegality will not affect it, provided the loss have no connection with it. A question that has been very extensively discussed, and in England remained for a long time undetermined, relates to the legality of making and enforcing, in one country, insurance upon a trade which is illegal by the laws of another. An insurance, for instance, is made in one country in fraud of the revenue laws of another. A loss occurs. Is the insurance valid? This was so held by Lord Mansfield in *Planche v. Fletcher*, 1 Doug. 251, upon

the ground that one nation does not take notice of the revenue laws of another. And although the morality of the principle has been a good deal doubted, yet it may now be regarded as settled in the jurisprudence of England and this country that such insurances are valid and enforceable, provided the insurer knew, at the time, the nature and precise character of the risks he was taking.

§ 531. Another kind of merchandise which has presented some questions of difficulty consists of *contraband goods*. These are commodities particularly useful in war, such as arms, ammunition, horses, timber for ship-building, naval stores, and in some cases provisions, especially if in a manufactured state. The great question here presented is, whether a trade in goods contraband of war carried on by a neutral, can be deemed legal, and insurances thereon enforced in the courts of the neutral country. It is admitted that such goods, by the law of nations, are legally liable to seizure and condemnation by the belligerent powers. But are these rights under this law, of a character to control the jurisprudence of the neutral country? This question came up in Massachusetts in the case of *Richardson v. Maine Insurance Company*, 6 *Mass.* 102, in which the court decided that insurance on goods contraband of war against capture and condemnation on that account, if the facts are known to the underwriter, and the risks are not excepted in the policy, is good, and may be enforced in case of seizure and condemnation. Some early cases in the State of New York are to the same effect. But as right and duty are correlative terms, and the rights between nations at peace never conflict, it is difficult to understand why a right given by the law of nations in time of war, should fail to be recognized among all nations which are the subjects of that law. The point is still regarded as open in England and in this country.

§ 532. The *wages of seamen* cannot be legally insured. The maxim is that *freight is the mother of wages*, and that

public policy will preclude every thing tending to diminish the strength of motive to earn freight. If the seaman could insure the receipt of his wages at all events, it would weaken or destroy the motive to earn them, and hence the law precludes this kind of insurance.

§ 533. The same principle that precludes seamen's wages from being a subject of insurance, in some parts of continental Europe operates the same upon freight which is not yet earned, and renders it uninsurable. By freight is here meant the remuneration to be paid to the shipowner for the hire of his ship. In England and in this country a party having an interest in the subject-matter from which the freight is to arise, may insure the freight, provided the ship has actually begun to earn it. An inchoate right to it is an insurable interest, and even an agreement that advances shall be paid by bills drawn by the captain against freight, gives the parties making such advances an insurable interest in the freight. *Wilson v. Martin*, 34 Eng. L. & Eq. 496. Under this term may also be insured the benefit an owner would derive from carrying his own goods in his own vessel; but he must show that, had not the peril insured against intervened, some freight would have been earned; that either some goods were put on board, or that there was a contract for doing so.

§ 534. As regards the person insuring, the rule is, that any one having an interest in the subject-matter of insurance, may get himself insured to the extent of that interest; and further, that any person may be said to have an interest, who may be injured by the risks to which that subject-matter is exposed. Such an interest need not amount to *property* in the subject of insurance. One holding goods merely as agent, may insure. The mortgagor and mortgagee both have an insurable interest in the property mortgaged, the latter, however, only to the amount of his claim. Insurance by the former does not enure to the benefit of the latter except in case of assignment; and if assigned as collateral

security, and upon the destruction of the property mortgaged the insurers pay the sum insured to the mortgagee, it is to be applied as so far a satisfaction of the mortgage debt. *Roberts v. Trader's Ins. Co.*, 17 Wend. 631.

§ 535. An insurable interest is termed one *sui generis*, and peculiar in its texture and operation. It covers inchoate rights, provided they are founded on subsisting titles, unless they are prohibited by the policy of the law. Thus there exists the right to insure expected or contingent profits, but in such case the insured must have a real interest in the subject-matter out of which they are expected to arise. In such case, no recovery can be had without showing that some profit would have been realized from the adventure if the loss had not occurred. So, also, in a case quite analogous, commissions which are expected to arise from the sale of consigned property constitute an insurable interest in the property by the consignee.

§ 536. The interest which is acquired by the insurer in the safety of what he insures, constitutes of itself an insurable interest in certain cases. This is termed *re-assurance*, and the contract in which it is embraced is wholly distinct from that of the original insurance; and hence the re-insured is held to prove the loading and value of the goods, as also the existence and extent of the loss, as in the case of the original insurance. In this, the insurer seeks to indemnify himself against the heavy amount of risk he has undertaken, and his profit, if any, lies in the smaller sum for which he can get the same risks again insured.

§ 537. The insured has also sufficient interest in the solvency of his insurer to procure an insurance upon that from a second insurer, but the contract he enters into is a new contract, the new insurer not becoming strictly a surety for the first one. This is not often done, as by multiplying the charges, it lessens the profits of the voyage. So, also, the insured may make a *double insurance*, in which case there are two insurances on the same risk, and both in virtue of



the same interest. But in such case, the law will not permit the receipt of a double satisfaction in the event of loss. Each underwriter is bound to contribute ratably his proportion of it. It is the rate of subscription, and not the order of time, that must govern; and if the insured proceeds, as he has a right to do, to collect the whole loss out of one of the insurers, the latter can recover against the others their ratable contribution. It is competent for parties to introduce into their policy a clause preventing the rule of contribution, and rendering the insurers liable according to the order of dates of their policies; and what is termed the *American clause* to that effect, reads thus: that "in case of any subsequent insurance, the insurer shall, nevertheless, be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent assurers." It is held that such a clause bars all claims for contribution from subsequent insurers upon the same cargo, although there was aliment for all the policies at the time of subscription. *The American Insurance Company v. Griswold*, 14 Wend. 399.

#### QUESTIONS.

Where must subject-matter appear, and how? To what is policy limited? How does ship become, if specified? What in relation to cargo? What included where body of ship is insured? What does it cover? How may cargo be insured? What the inconvenience attending it? What the effect in a policy of words *lost or not lost*? What the necessity of their introduction? Voyage from abroad, how insured? Why upon such imperfect description? What necessary in regard to cargo? How must subject-matter be? How if illegality in commencement of voyage? How, in case of subsequent illegality? Can insurance be valid in one country upon a trade illegal in another? What are goods contraband of war? Is insurance upon such goods valid in a neutral state, and under what circumstances? Are the wages of seamen insurable? For what reason? Is freight, yet to be earned, insurable? What is meant by freight? Under what circumstances may freight be insured? How where owner carries his own goods in his own vessel? What must he then show in order to recover? What must person have

in subject-matter to be insured? When may person be said to have an interest? Must such interest amount to property? What is right of insurance of mortgagor and mortgagee? What application when insurance assigned to mortgagee and loss and payment? What does insurable interest cover? Under what circumstances are expected or contingent profits insurable? What, in such case, must be shown to recover? By whom are expected commissions on sales insurable? What is re-assurance? What interest supports it? Between what parties, what the nature of the contract? What is the re-assured held to prove? What does the insurer here seek to do? Wherein lies his profit? What right does the interest of the insured in the solvency of the insurer give? What the nature of the contract he enters into? Does the new insurer become a surety? What is *double insurance*? Can there be, in such case, in the event of loss, a double satisfaction? What, in such case, is the duty of each insurer? Which governs, rate of subscription or order of time? What, if insured collects the whole out of one of the insurers? What is it competent for parties to introduce into their policy? What is the American clause? What the legal effect of it?

### PART III.

#### THE POLICY, INCLUDING REPRESENTATION AND WARRANTY.

§ 538. The policy is designed to express the contract entered into between the insurer and the insured. According to uniform usage and practice, it must be in writing. Printed forms are very generally used. These are of early origin, are awkward in their expression, but from long use have, to a great extent, acquired a fixed meaning from judicial decisions and the usage of trade. The first inquiry that presents itself, relates to the effect of mere wager policies, and is embraced in the question: Is a mere hope or expectation, without any interest in the subject-matter, sufficient to sustain a contract of insurance? In England it is rendered void by statute. In the State of New York, a mere wager policy, such as that a ship, in which neither have an interest, would arrive safe at such a day, has been assumed good at common law. The doctrine has this limitation, that the thing wagered or insured must be perfectly innocent, because if

against public policy, or contrary to public morals, or if it injuriously affect the interests or feelings of third persons, it is void. But all such are now rendered void by statute. In many other States, as in Pennsylvania and Massachusetts, such policies are deemed void at law.

§ 539. A distinction is to be taken between policies that are *open* and those that are *valued*. The first is where the value of the thing insured is not inserted in the policy; the second, where such value is settled by agreement between the parties, and inserted in the policy, as: "the said ship, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at £——." In all cases of open policies, if a loss happen, the value of it is to be ascertained at the trial. It is often a matter of very great convenience to the assured, especially if the subject-matter be profits, which are extremely difficult of proof, to have them valued in the policy, and in *Mumford v. Hallett*, 1 *John. Rep.* 433, the court assume that every policy on profits must, of necessity, be a valued one on account of the almost impossibility of making proof of their value. The value inserted in the policy should be the prime cost of the goods, including incidental expenses previous to shipment, together with the premium of insurance. It should cover the whole amount of the insurable interest, and when agreed upon and inserted in the policy, it is, in the absence of all fraud or mistake, conclusive between the parties, leaving to the assured only to prove the insurance, the loss, and some interest in the property. This is equally applicable to total and partial losses. The fact of valuation, however, is to be limited entirely to what it proposes to be—an agreement as to value. It leaves open the question whether all, or what part of the property valued, has been at risk. Whether the insurance be upon freight or cargo, the question what was put on board and subjected to risk, is an open one. And so, also, where a cargo is composed of valued articles

some of which are lost, and others arrive in safety, the claim of the insured will be reduced in the proportion to which the articles lost bear to the valuation of the whole at the time the risk commences.

§ 540. The policy should contain the names of the parties, both insurer and assured. So far as regards the latter, the insurance is often made, in this species of policy, on account of *A*, or *of whom it may concern*; and an insurance thus made by a partner, will cover partnership goods, although it will not have that effect if made in the name of an individual partner. The person whose name is inserted, or the *A* above mentioned, is usually the person who effects the insurance; and who is often an agent, and by adding *for whom it may concern*, he lays a foundation upon which the interest of the real party may be averred and shown. But the meaning of the phrase is not that it will cover the interest of anybody who may happen to have an interest in the property insured, but only that of the person who was in the contemplation of the parties to the contract. It is the person ordering the policy, although he was at the time unknown to the insurer, and even to the agent or broker procuring the policy. It will apply to the person who is intended to be insured, even if he gave no authority to effect the insurance. It is sufficient if he afterwards adopt it, which he may do either previously or subsequently to the occurrence of the loss.

§ 541. If the insurance be on a ship, the name of it should be correctly stated in the policy, as a variance from its right name might discharge the insurer. To avoid this, it is a usual practice to insert in the policy "or by whatever other name or names the ship may be called," thus laying a foundation sufficiently broad to enable the owner to prove the identity of the ship, which will be all that may be necessary on this point to hold the insurer.

§ 542. Another thing, which for the last century it has been usual to insert in the policy, is what is termed a mem-

orandum, which is intended to qualify or restrict the risks. Without this, the insurer would be liable for every loss coming within the risks insured against, however trifling or insignificant it might be. This was often more troublesome to arrive at than to pay. The following is the form of the memorandum: "N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five per cent.; and all other goods, also the ship and freight, are warranted free from average under three per cent., unless general, or the ship be stranded." The legal effect of this is to protect the insurer from liability to small averages, that is, to partial losses; and in regard to the class of articles first above specified, it protects him from making good any partial loss whatever, and under the second class, any loss under five per cent., unless, in either case, the loss happens in consequence of a general average, or a stranding of the ship. It is unfortunate that the word *average* here made use of, has more than one meaning when employed in reference to sea losses. Its meaning here is "*a partial loss by sea damage.*" "Free from average unless general," therefore, as first stipulated, means that the insurer is not to be liable for any loss which is not a total one on any of the articles stipulated; and the second stipulation exempts him from all liability as to articles there enumerated for any loss under five per cent. of their previous cost or insured value. In both cases, if there be a total loss, the insurer pays the full amount.

§ 543. One of the questions which has arisen under the memorandum clause relates to the kind of destruction which will subject the insurer to the payment for a partial loss on memorandum articles. Does it require an absolute destruction of the articles, or is it sufficient if the articles still exist in specie, their value being destroyed? The decisions in England have been somewhat fluctuating, but in this country the rule is, that to charge the insurer, the memorandum

articles must be specially and physically destroyed, and must not exist in specie. 3 *Kent's Comm.* 295-6. So, also, it has been held that at a port intermediate the destination of the vessel, the loss is total when the goods are so much damaged as to be incapable of reaching the port of destination, in specie, or if they are in such a state that the health of the mariners and the safety of the vessel will not admit of their further transportation. *Hugg v. Augusta Ins. Co.* 7 *How. U. S.* 595. The same point substantially came up more recently and with the same result in the State of New York, in *De Peyster v. Sun Mutual Insurance Company*, 19 *New York*, 272.

§ 544. Another question has arisen where a part of the memorandum articles have been totally destroyed, while the residue have been partially damaged. Can a recovery be had against the insurer for the part so totally lost? This question has been decided both ways in England, but in this country it is held that the policy is to be considered upon so much of the cargo, as an integral subject, and that the assured could not recover for each article totally lost, as there was neither a general average, nor a total destruction of the subject insured. *Guerlain v. The Columbian Insurance Company*, 7 *John.* 527. *Wadsworth v. Pacific Ins. Co.* 4 *Wend.* 33. In regard to the second provision, exonerating the insurer from liability under a certain per cent. of loss, as five per cent., it is held that if the total amount of losses during the voyage, although they may happen at several different times, amount in the aggregate to five per cent., the insurer will be liable. *Donnell v. Col. Ins. Co.* 2 *Sumn.* 366.

§ 545. It may become important to determine what, in a legal sense, is a *stranding* of a vessel. The rule laid down by Lord Tenterden in *Wells v. Hopwood*, 3 *Barn. & Adol.* 20, was, "that where a ship takes the ground in the ordinary and usual course of navigation and management, in a tide river or harbor, upon the ebbing of the tide or

from natural deficiency of water, so that she may float again upon the flow of the tide, or increase of water ; such an event is not to be considered a *stranding* within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a *stranding* within the meaning of the memorandum."

§ 546. The next inquiry connected with the policy relates to REPRESENTATION and WARRANTY. It is important to understand the nature and character of each, and the effect each has upon the rights of the parties. The first does not necessarily form a part of the policy by being inserted in it. It is not usually found in the policy. It relates to facts extrinsic to it, and is defined to be "a collateral statement, either by writing not inserted in the policy, or by parol, of such facts or circumstances relative to the proposed adventure, as are necessary to be communicated to the underwriters, to enable them to form a just estimate of the risk." It may, however, have insertion in the policy, and yet retain the effect of a representation. This occurs when the statement is not of facts, but simply relates to information, expectation, or belief ; or the parties may, at the time, expressly declare that the statement is to be regarded, or to have the effect merely of a representation. A representation which is positive in its character, and on a point that is material, is deemed essentially a part of the contract ; and if it be a misrepresentation, or a concealment of a fact material to the risk, it will avoid the policy. And it will have this effect in the absence of fraudulent intention, and although it occurred through mistake, neglect, or accident. Nor will the case be varied though the loss were to arise from a cause unconnected with such misrepresentation or concealment. And a fraudulent representation relating to a fact not material to the risk, will avoid the policy, if, in the insurer's judgment, it be material in respect to his in-

duancements to undertake it. *Vatten v. The National Fund Life Assurance Co.*, 20 *New York Rep.* 32. There is this difference between fraudulent misrepresentation and one originating in mere mistake; the one avoids the policy without showing its materiality. It is enough if it be intentionally false, without being material. But in the other case, the materiality of the misrepresentation must be shown, or it will not affect the policy. And then it affects it not on the ground of fraud, but because the insurer has computed the risk upon circumstances which did not exist.

§ 547. Such misrepresentation, in order to be effectual in defeating an action on the policy in case of loss, must have relation to a *fact*, and not be a mere statement of *opinion*, *expectation*, or *belief*. Such a statement, if made in good faith, will not affect the policy. But if made in bad faith, and with a fraudulent intent, it will have that effect. The misrepresentation must also relate to a fact then existing or not existing, and must not be in the nature of a promise of doing something in the future; and hence where the insured, at the time the insurance was obtained, made a verbal promise to the insurers, that if they accepted the risk, he would discontinue the use of a fireplace in the basement, and in the place of it use a stove; but after having obtained the policy, he neglected to perform that promise, in consequence of which the building was burned, it was held that the action on the policy was nevertheless sustainable; that such a statement, having no relation to a past or existing fact, material to the risk, could not be regarded as a misrepresentation; and having reference to the future, in order to bind, it must be inserted in the policy, and thus become a warranty. *Alston v. The Mechanics Mutual Insurance Company in the City of Troy*, 4 *Hill*, 329. Although this principle may be regarded as settled in the jurisprudence of New York, yet it is not entirely acquiesced in, as *Mr. Duer*, in his work on *Insurance*, insists that such



promissory representation, when positive and false, equally as any other, will defeat a policy.

§ 548. A representation to the first insurer is sufficient, and extends to all the subsequent underwriters upon the same policy, and affects them equally as the first. The reason assigned is, that all such subsequent underwriters entered into the insurance upon the strength of their confidence in the first one's judgment and knowledge, and are hence entitled to avail themselves of all the conditions upon which he subscribed. But it does not effect a subsequent underwriter upon a different policy, although upon the same subject-matter and against the same risks. *Elting v. Scott*, 2 *John*. 157. The materiality of the representation, as well as the necessity of its communication, is a question of fact for the jury.

§ 549. As to what must and what may not, be matters of representation, the governing principle that should guide the insured, is, to communicate all the knowledge he possesses in reference to the subject-matter insured, and the risks against which it is insured, which may affect the mind of the insurer, either as to the fact of insuring, or as to the premium or price he will charge for it. He is not bound to communicate matters of news or general intelligence; nor loose rumors which may be afloat; but if he has any particular information not generally known or accessible to the public, he must communicate it to the insurer. The latter is bound to know all matters affecting the nature and general course of trade, and every thing of a general character relating to the voyage. The general rule is, that those facts which are material to the risk, and which are known to one party and not to the other, must be communicated at the time of effecting the policy. Although the assured is not held responsible for acquiring all the accessible information material to the risk that may be had down to the period at which it is taken; yet if he acquires knowledge of a material fact, after having given instructions for effecting a

policy, he must either communicate it to the insurer, or withdraw his instructions. If the insurance is effected on the application of an agent, the assured takes the responsibility of all the agent's communications at the time of obtaining it. So, also, if he adopts the information given, and thus makes it the basis of his contract of insurance, he becomes equally responsible for any concealment that may have been practised by the agent, the same as if it had been practised by himself.

§ 550. Another important matter to be considered in connection with the policy is the subject of warranty. This is either express or implied. The former is an express stipulation entered into by the parties at the time of effecting the insurance, which is in writing, and on some part of the policy, either in the body of it, or on the margin, or at the bottom, or in some writing referred to and thus made a part of it. Whatever is thus made a part of a policy in the form of a warranty, is held to dispense with all representation in relation to it, as in such case it is made expressly a part of the contract of insurance itself. It differs from a representation in another important respect besides being in writing and a part of the contract. It is in the nature of a condition precedent, and requires to be performed, or there is no contract. But not only is performance required; it must be a strictly *literal* one. And that, too, whether the thing warranted be material or not. And so, also, whether the loss happened by reason of a breach of the warranty, or did not, is immaterial. A breach of it is equivalent to an announcement that there never was a contract. All conditions precedent require strict performance in order to give a right of action. But while a warranty is bound down by this great strictness of construction, all that is necessary in regard to a representation is—substantial compliance. The assured will, therefore, be cautious what he consents to have put into the policy under the form of a warranty, while the insurer will seek to introduce all that is possible under that

form. It is, of course, competent for the parties to make whatever fact they choose the subject of a warranty. The most usual are the following. 1. That the ship shall sail on a particular day, and under such a warranty the ship must not only have its cargo on board, but must be completely unmoored, and, in good faith, set sail on the voyage. The raising of anchor, getting under sail, and moving onwards, is not sufficient, unless it is all done with the view of commencing the voyage, every thing being in readiness for that purpose. 2. To depart with convoy, for protection, if in time of war. 3. That the ship was safe on a particular day, which is sometimes inserted to restrain the force of the expression "*lost or not lost*," and if the ship be safe at any time during that day, the warranty is complied with. 4. That the subject-matter of insurance is *neutral property*; that is, *neutral* at the commencement of the risk; that she belongs to the subject of a neutral State, and shall be navigated according to the law of nations, and in accordance with treaties between the country to which she belongs and the belligerents. 5. "That the insurers shall not be liable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war."

§ 551. Of the implied warranties, one of the most important is *sea-worthiness of the vessel* at the time the policy attaches. This extends beyond the mere competency of the vessel to resist the ordinary attacks of wind and weather. It embraces every essential element calculated to insure safety to the vessel, such as a master possessed of competent skill and ability, a sufficient crew, and all the necessary and proper equipments of sails, anchors, &c. This being an implied warranty, it follows that any breach of the condition of sea-worthiness at the commencement of the risk, discharges the entire responsibility of the insurer, whether the loss incurred be in any way the consequence of such special defect of sea-worthiness or not. But when the contract once

attaches, it has no further obligation. Any defect of seaworthiness which may arise afterwards from bad faith, or want of ordinary prudence or diligence in the owner or his agents, discharges the underwriter from liability for any loss occasioned by, or the consequence of, such want of faith, prudence, or diligence, but from no others. It does not affect the contract as to any other risk or loss covered by the insurance, and not caused or increased by such particular defect. *The American Insurance Company v. Ogden*, 20 Wend. 287.

§ 552. It seems conceded that there may be different kinds of sea-worthiness; that it may be one thing in a port and another for a whole voyage; that it is very much the creature of circumstances, and must be construed in reference, and receive such a construction, as the peculiar circumstances at the time require. A rule admitting of no exception is, that the vessel must be seaworthy at the commencement of the risk, whatever it may be, in order to make the policy attach and render it a charge upon the insurer. A question has occurred of this character: If the ship be unseaworthy at the commencement of the risk, and the defect be cured before a loss, can a subsequent loss be recovered under the policy? In *Weir v. Aberdeen*, 2 Barn. & Ald. 320, it was held that it could. But in this country, much doubt has been thrown over it by the case of *McLanahan v. The Universal Insurance Company*, 1 Peters, 170.

§ 553. There is also an implied warranty that the insured will exercise reasonable diligence in guarding against the risks covered by the policy, so that no loss shall happen through his own default and negligence. One of the most common applications of this principle relates to the procuring sufficient documents to maintain the national character of the ship. As every ship asserts and maintains its national character by means of the documents it possesses, if a loss should happen through the default of the insured in not providing himself with those documents required by the

law of nations, or by particular treaties, the insurer would not be liable; and hence, if a ship carry simulated papers, which is contrary to the law of nations, and be condemned upon that ground, the "*the warranty of documentation*" is infringed, and the underwriters are not liable. *Oswell v. Vigne*, 15 *East*, 70. But disobedience to the mere export ordinance of a foreign State will not vitiate a policy. The difference between an express and an implied warranty of this kind is, that a breach of the former at the time of sailing, discharges the insurers, while a breach of the latter does not have that effect unless a loss occurs as a consequence of it.

#### QUESTIONS.

What does the policy express? What do usage and practice require in relation to it? What the objections and advantage of printed forms? What are wager policies? How regarded in England? How in New York? What limitation in New York? How are they by statute? How in Pennsylvania and Massachusetts at law? What is an open policy? What a valued one? When is value ascertained in open policies? What convenience, and to whom, in valued policies? When is it essential that it should be valued? And why? What should value inserted in policy be? What should it cover? What effect between the parties? What does it leave the assured to prove? What is it equally applicable to? What does it leave still as open questions to be proven? What effect when cargo composed of valued articles, some lost and others safe? What should policy contain as to names of parties? How may it be general? Who, in such case, generally effects insurance? What effect by adding, for whom it may concern? What is the real meaning of the phrase? Who is then the real party? What necessary as to stating name of ship? What effect of variance? What the practice to insert in policy? What the object of it? What is the use of the memorandum? What, without this, would the insurer be liable for? What is the legal effect of the memorandum? What is the meaning of *average* as here made use of? What does free from average unless general, mean? What kind of destruction will subject insurer to partial loss on memorandum articles? What is required in this country as to loss? What is the rule where part of memorandum articles are totally destroyed, and residue partially damaged? What the rule where insurer is exonerated from liability under certain percentage of loss? What, in a legal sense, is a stranding of a vessel? Does a representation form a

part of the policy? Is it generally found in the policy? What does it relate to? What is it defined to be? May it be inserted in policy and yet be representation? When does this occur? How may parties make it so? What is a positive material representation deemed? How, if a misrepresentation or concealment? What if it occurred through mistake, neglect, or accident? What if loss arises from some cause unconnected with misrepresentation or concealment? When will fraudulent representation avoid policy? What is the difference between fraudulent misrepresentation and one originating in mistake? On what ground, in latter case, does it affect it? What must misrepresentation relate to? What kind of statement and how made, will not affect the policy? How, if made in bad faith, and with fraudulent intent? What must misrepresentation relate to? How, if in the nature of a promise? A representation to whom, is sufficient? To whom does it extend? And whom affect? What the reason? How subsequent underwriter upon a different policy? Who decides upon materiality and necessity of representation? What must insured communicate to insurer? What is he not bound to communicate? What, if he have particular information? What is insurer bound to know? What is the general rule? How, if assured acquires knowledge of material fact after giving instructions, and before insurance? How, if insurance effected on application of agent? How does assured become responsible for representation or concealment by agent? How many kinds of warranty? What is the express? What does warranty dispense with? How differ from representation? What in the nature of? What require? How must performance be? What is breach equivalent to? What required by all conditions precedent? What is necessary in regard to a representation? What is competent for parties? What is the first common subject of warranty? What necessary under such a warranty? What the second subject? What the third? What the object of that? What the fourth? Neutral at what time? What the fifth? What is the first implied warranty mentioned? What does this embrace? What effect of breach of this at commencement of risk? How with defect of sea-worthiness arising afterwards from bad faith, or want of prudence? How affect contract as to other risk or loss? Are there different kinds of sea-worthiness? What are they? What construed in reference to? What is the rule admitting of no exception? What if ship be unseaworthy at commencement, and defect be cured before loss? What another instance of implied warranty? What application of this principle? What must insured provide himself with, to assert national character? What the consequence of omission? What difference between express and implied warranty of documentation?

## PART IV.

## THE NATURE OF THE PERILS INSURED AGAINST.

§ 554. We here find the undertaking of the insurer, that which forms, on his part, the consideration for his receipt of the premium. The nature and extent of these perils depend upon the agreement of the parties. The assured may legally protect himself against all losses except those which are repugnant to public policy, or positive prohibition, or which are occasioned by his own wilful misconduct or fraud. The perils insured against are all expressed or comprehended in the policy. They are enumerated as those "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and counter marque, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever; barratry of the master and mariners, and all other perils, losses, and misfortunes, that have, or shall, come to the hurt or detriment, or damage of the said ——— or any part thereof." This is the clause generally made use of to cover the perils insured against. The latter part of it "and all other perils," &c., has not the effect to cover all losses that may occur from whatever cause, but it is restricted to losses of a similar nature, and arising from similar causes to those which are enumerated. Its use, therefore, is to generalize those enumerated, so that all causes or occasions of loss should be enumerated or referred to in the policy.

§ 555. The term *perils of the sea*, include all losses occasioned strictly by *sea damage*, such as stress of weather, winds and waves, lightning and tempest, rocks, sands, &c. It is meant, however, only to guard against extraordinary perils, and not those to which a ship is ordinarily exposed; for if a loss occur from the latter, it will be from unseaworthiness of the vessel, or from such culpable neglect or misconduct of master or crew as should not render the insurer

responsible. It does not cover losses flowing from the ship's ordinary employment, or the inherent infirmity of the article, and hence in a policy on a cargo of slaves, the insurer was not held liable for a loss occasioned by their insurrection, a loss from that cause being adjudged to be one arising from the inherent vice of the subject insured. *McCargo v. Merchants Ins. Co.* 10 *Robertson (La.) Rep.* 202-334. So, also, all losses arising from the wear and tear of the ship or its equipments, her destruction by worms, or loss of anchors by friction of the rocks, are none of them covered by insurance. A loss occasioned by rats is more difficult of determination, and has occasioned some diversity of decision. The general opinion seems to be, that this is a loss for which the insurer is not liable, although a different principle is adopted in Pennsylvania. *Garrigues v. Coxe*, 1 *Binn.* 592.

§ 556. The dividing line between ordinary and extraordinary perils is very difficult of ascertainment in many cases. If the ship be run down, or a loss be occasioned by her taking the ground on the uneven bed of a dry harbor, it is reckoned a peril of the sea. So, also, if there occurs a loss of animals, killed by the agitation of the ship in a storm. To avoid as much difficulty as possible upon this point, the courts have, with great unanimity, adopted the rule, that the peril, whatever it may be, upon which the policy attaches, must be the *proximate* and not the *remote* cause of the loss, thus adopting the maxim *causa proxima non remota spectatur*, and the reason for it given by Lord Bacon, that "it were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause." This point has been several times tested by the fact of a collision between two vessels by which one was injured, and the colliding vessel having been compelled by a judicial sentence or decree to pay the damages, its owners have sought to make the insurer liable for the payment of such damages. The liability here, has been a question exten-



sively discussed, both in the United States Court, and in several of the State courts. The decision has very uniformly been that although the collision is a peril within the policy, and any loss occasioned by it is therefore a loss for which the insurer is liable, yet the sentence or decree awarding damages is not, and as that is the proximate cause of loss, the insurer is not liable. *General Mutual Insurance Company v. Sherwood*, 14 *How. S. C. Rep.* 351. *Matthews v. The Howard Insurance Company*, 1 *Kern.* 9. The point was decided directly the reverse in Massachusetts in *Nelson v. The Suffolk Insurance Company*, 8 *Cush.* 477, but unfortunately this case placed much reliance upon the two last-mentioned cases, the decisions in both of which were subsequently reversed, the one in the highest court of the Union, the other in that of the State of New York. Another illustration of the same rule or principle occurs where a ship is driven ashore by the wind, and then captured by an enemy. The loss is imputable to the capture, the proximate cause, and not to the stranding. Another still, is found in a case where a partial loss is followed by a total one. It is the latter that is alone regarded by the law, the former being entirely merged in it.

§ 557. The question is very likely to arise when a missing vessel shall be presumed to have perished by a peril of the sea. This question must necessarily depend upon such an infinite variety of circumstances, that no precise time is fixed upon by the English law. Each case must be governed by its own circumstances, but after a sufficient length of time has elapsed to adjudge the missing vessel lost, "that loss is presumed to have happened immediately after the date of the last news; so that if an insurance be for three months, and the vessel not being heard from, a further insurance is made for a year, and the vessel is never heard from, in that case the first insurer pays the loss."

§ 558. One of the perils usually insured against, is *fire*, and it is not material what occasioned it. It may result

from accident, or lightning, or any act done in the performance of duty. It has even been held, but after a very long discussion, that the insurer is liable where the fire which occasions the loss occurs through the negligence of the master and mariners. *Busk v. Royal Exchange Assurance Company*, 2 Barn. & Ald. 73. See also, in this country, *Patapsco Ins. Company v. Coulter*, 3 Peters's U. S. Rep. 222. But if goods, when put on board, are in such a damaged state that they are liable to effervesce, and thus in fact generate the fire by which they are consumed, the insurers are not liable for the loss.

§ 559. Another of those perils is *barratry* by the master and mariners. This includes every species of fraud or intentional breach of duty on the part of the master, in his character of master, or of the mariners, concerning either the ship or cargo. It embraces every breach of trust by either one of these, which is committed with dishonest views. As these are all agents or employees of the assured, and subject to his control, it is singular that their vicious acts should ever have become a subject-matter of insurance, and among some of the continental powers of Europe this is not a risk insured against. The following are instances of barratry. A wilful deviation in the voyage; committed in fraud of the owner; smuggling, running away with the ship, sinking or deserting her, defeating or delaying the voyage with a criminal intent, dropping an anchor with a fraudulent intent, sailing out of port in violation of an embargo, or without paying the port duties, are all acts of barratry, being wilful breaches of duty by the master. This can only be committed by some one, not the owner, who is in charge of the ship; and it cannot arise through ignorance or inattention, as it must originate in a vicious motive, although whether that be to benefit himself or to injure the owner, is entirely immaterial. Nor is it essential that the loss should be contemporaneous with the barratry. But it must occur during the voyage insured, and hence

when a barratry was committed by smuggling, for which the ship was seized, but not until after she had been moored twenty-four hours in safety at her destined port, the insurer was held not liable. *Lockyer v. Offley*, 1 *Term. Rep.* 251. The point has been presented whether a loss was chargeable upon the insurer which was occasioned remotely by the negligence or misconduct of the master, not amounting to barratry, but immediately by some other peril in the policy operating directly upon the property. Although it was held so chargeable in *Fulton v. The Lancaster Ohio Insurance Company*, 7 *Ohio Rep. part 2*, 1-25, yet the rule that the proximate, and not the remote cause is to govern, may now be regarded as the settled policy of both English and American law. *Walter v. Maitland*, 5 *Barn. & Ald.* 171. See cases referred to in § 556.

§ 560. Other perils insured against are *pirates, rovers, and thieves*. Under the latter term, when insured against *by name*, the elementary writers understand that it is limited to that *theft* which is accompanied by violence, and does not extend to *simple theft*, and it is so laid down by Chancellor Kent, see 3 *Kent's Comm.* 303. But the point came expressly up in the Court of Errors in the State of New York in *The American Insurance Company of New York v. Bryan*, 26 *Wend.* 563, and, after much discussion, it was decided that the word *thieves* in a policy, covers a loss occasioned by a simple larceny, unaccompanied by open force or violence, by persons other than the master or crew of the ship in which the goods were transported.

§ 561. Another large class of risks is included under *Takings at sea, Arrests, Restraints and Detainments of all Kings, Princes, and People*. These refer to acts of government, the term *people* signifying the ruling power of a country, whatever it may be. One of the most usual of this kind of detainments is an *embargo*, which is an arrest laid on ships or merchandise by public authority, or State prohibition; and whether of one's own or a foreign govern-

ment is immaterial. A question has arisen here, whether a foreigner could claim against a British underwriter in a matter founded on the act of his own State, upon the ground that he is to be deemed a party to the acts of his own government. But in *Bassett v. Meyer*, 5 *Taunt.* 824, it was held no objection to the insured's right of recovery that the loss happened by the act of the government of his country, though he and the insurer were subjects of different States. The same principle has been fully sustained in this country, and the doctrine affirmed that a subject was not to be deemed a party to the legislative, and much less to the judicial acts of his own country, so as to deprive him of remedy on a policy by a foreign insurance office, by reason of any acts or judgments of his own country. *Francis v. Ocean Insurance Company*, 6 *Cowen*, 404, and affirmed on error in 2 *Wend.* 64. Whether a *blockade* is a sufficient *restraint* of trade has been a matter of doubt, on the ground that the peril producing the loss must act immediately upon the subject insured, and that the mere fear of capture, although just, is not sufficient. But the prevailing opinion now is, that a blockade of the port of destination, interdicting all commerce with it, is a sufficient peril within the policy. *Smidt v. The United Insurance Company*, 1 *John. Rep.* 249.

#### QUESTIONS.

What do the perils insured against depend upon? Against what may the assured legally protect himself? Where are the perils insured against to be found? What are they? What effect does insertion of "all other perils," &c. have? What do perils of the sea include? What perils are meant? What does it not cover? How is it with loss occasioned by rats? What are some instances of perils of the sea? What the rule adopted as to peril being proximate or remote cause of loss? What the maxim governed by, and reason of it? How has this point been tested? How has the decision very uniformly been? What other illustration of the same rule or principle? What other still? When is a missing vessel presumed to have perished by a peril of the sea? When is the loss presumed to have happened? When a fire causes loss, is it material what occasioned it? What may it result from? Is

insurer liable when the loss occurs through the negligence of the master and mariners? How, when goods effervesce, and generate fire? What does barratry include? What embraced within it? What are some instances of barratry? By whom must this be committed, and in what originate? When may loss occur? What illustration? Are losses by thieves limited to cases accompanied with violence? Does it embrace simple larceny unaccompanied by violence? What do restraints, arrests, and detainment by kings, princes, and people refer to? What does the term people signify? What is one of the most common detainments? What is an embargo? Can a foreigner claim a right founded on the act of his own State? Is a *blockade* a sufficient restraint of trade to be a peril insured against? How is it, when of port of destination?

## PART V.

## THE VOYAGE EMBRACED IN THE POLICY.

§ 562. An insurance may be *on time*, or *on a ship for a particular voyage*. When a ship or cargo is insured for a term of time, the termini of risk are the day and hour specified at which the insurance commences and terminates. The place either of departure or of destination is then immaterial, and no questions relating to deviation can arise. In this kind of policy a clause is often inserted, providing that if the vessel be at sea at the expiration of the time, the policy shall continue in force until she arrives at her port of destination.

§ 563. In the other kind, or policy on a ship for a particular voyage, great nicety is required in accurately describing the voyage. This includes not only a statement of the times and places at which the risk is to begin and end, but also usually the intermediate places at which the vessel may be allowed to call. A ship may be insured on a voyage *out*, or *in*, or *out and in*; or for any part of the voyage, specifying particularly what part, or from *port to port*. A ship insured *at and from* a certain port, will cover all risks while taking in its cargo at the port; but if insured *from* such a port, it must break ground before the risk commences. The insurance *at and from* implies either that the

ship is at the place named at the time of the insurance, or that she will arrive there in good condition.

§ 564. There are often distinct policies on the outward and homeward voyage, and in such case if the ship were to perish in a foreign port with portions of her outgoing and return cargo on board, there might be a conflict between the policies; but it is presumed that each policy would protect such portions of each cargo as were on board at the time of the disaster. The risk on the cargo is generally limited to continue until it shall be discharged and safely landed. But in such case there should be no unnecessary delay, and as policies are construed according to long-continued and well-settled usage and custom, if it be the usual course to carry goods from the ship to the shore in a lighter or smaller vessel, and they are injured while in such transit, the insurer must make good the loss. But if the assured take charge of them, sending them in his own lighter, or in one specially employed by him, the insurer would be discharged. The insurance is always designed to protect the cargo while actually on board the ship, but if it be temporarily landed from necessity during the voyage, it is still protected by the policy.

§ 565. Where the insurance is upon the outward cargo and upon a return cargo, *the latter to be derived from the proceeds of the former*, it has been made a question what kind of return cargo may come under the protection of the policy. It is clear that the same goods returned in the same vessel would not come within its protection, but if the return cargo be procured by the sale or exchange of the outward cargo, or even by a deposit of the outward cargo and a credit raised upon it, the insurer would be liable in case of loss. *Haven v. Gray*, 12 Mass. 71.

§ 566. The policy usually protects the vessel until she has been anchored twenty-four hours in safety, and this has been held even to protect against a seizure made after that time, although for an act of smuggling committed during

the voyage. *Lockyer v. Offley*, 1 Term. Rep. 252. If the voyage insured be to a country generally, the risk terminates at the first port made for the purpose of unloading. If it be insured to several different places, as A, B, and C, it means to all or any of them, with the qualification that if the vessel go to more than one, she must visit them in the order in which they are mentioned in the policy. If the voyage be to or from a district containing several ports, with liberty to stop at any, they must be visited in their geographical order.

§ 567. The nature and effect of deviation from the prescribed course often comes up for consideration under marine insurance. It is a departure of the vessel voluntarily, and without necessity, from the usual course of the voyage, and the effect of it is to discharge the insurer, as it is the substitution of a new voyage in the place of the one the risks of which he had assumed. The exemption of the insurer grows out of the violation of his contract by the assured, and so strictly is the doctrine maintained, that where a vessel sailing down the Frith of Forth, and having liberty to touch at one place, touched at another in its stead, equally in her way, it was held to be a fatal deviation. *Elliot v. Wilson*, 7 Bro. P. C. 459.

§ 568. A deviation from necessity will not discharge the insurer. But it must be limited to the necessity that produced it, and if so, it will be justified, although on account of a peril not insured against. Instances of this are, when done from stress of weather, or to procure necessary repairs, or to avoid capture or detention. It is a point not yet entirely settled whether, or how far, a deviation may be held justifiable, the object of which is to relieve a vessel in distress, or to save the goods, or even lives of those on board; but the prevailing opinion now is, that if done for the former, it would discharge the insurer, but if for the latter, it would leave him liable. Wherever a ship is compelled by necessity to deviate from the course laid down in the policy,

the whole remainder of the voyage must be under the control of necessity, and must be pursued in the most direct course, and within the shortest time, or it will amount to a deviation, and discharge the insurer. *Lavabre v. Wilson, Doug.* 284. The grounds upon which deviations are claimed not to discharge the insurer are usage, necessity, and the true construction of the policy. Usage, however, can never be claimed to justify it when in conflict with the clear and positive terms of the policy.

### QUESTIONS.

What two kinds of insurance? When on time, what are the termini of the risk? Are place and deviations considered in such insurance? What clause is often inserted? What is required in policy on a ship for a voyage? What does this statement include? How may a ship be insured? What does insurance *at and from* cover? When does insurance *from* commence? What does insurance *at and from* imply? What are there often distinct policies on? What conflict does this sometimes lead to? How settled? What is risk on cargo limited to? How are policies construed? Who bears loss sustained when goods are carried from vessel to shore in lighters? When does insurance protect cargo? How, if temporarily landed from necessity? When insurance is on return cargo *as proceeds* of outward cargo, to what does it not, and to what does it have application? How long does policy usually protect vessel? What illustration? If voyage be insured to a country generally, when does risk terminate? How, when insured to several different places? What is a deviation? What the effect of it? Why? What does exemption of insurer grow out of? What instance in illustration? What effect of deviation from necessity? To what is it limited? What instances? What rule where deviation is to save goods or life? What are the grounds upon which deviations are claimed not to discharge insurer? How in regard to the claim of usage?

### PART VI.

#### PROCEEDINGS IN THE EVENT OF LOSS.

§ 569. No difficulty ordinarily occurs in the case of insurance except in the event of loss, and then the first point to be settled is whether it be a *total* or a *partial* one. As the whole of insurance is summed up in *indemnity*, it is im-



possible to apply any remedy without first ascertaining the character and extent of the loss. A *total* loss may be of two kinds. It is either *total per se*, in which the thing insured is utterly destroyed, or wholly lost to the assured, or it is such as may be rendered total by *abandonment*, in which the subject-matter of insurance is destroyed or lost to the assured, to such an extent as to justify a relinquishment of whatever may be saved, to the insurer. Instances of the former are where the ship insured is destroyed by fire, or by perils of the sea, or by any other means ceases to exist in specie, and so also where the assured is deprived of it by capture.

§ 570. The first question of importance that arises here, relates to the circumstances under which the assured may exercise the right to abandon to the insurer. The rule is, that if the ship or goods insured be damaged to more than half the value, by any of the perils insured against, the assured may abandon and recover as for a total loss. There may be a separate abandonment of part of the cargo insured where a part only of it is lost or damaged above a moiety in value, provided the insurance was originally upon each article separately, but not if it be upon different kinds of goods indiscriminately, or as one entire parcel. The value here meant is the market value at the time of the disaster which occasioned the loss. The amount of the injury done to the ship is determined by the expense of the repairs at the port of necessity, including that of getting the ship afloat if stranded.

§ 571. In order to know what to abandon, it is necessary to have clearly settled what is the subject-matter insured; and in reference to this no difficulty has occurred except where a *ship is insured for a voyage*; and in that case much difficulty has been experienced in determining which is insured, the *ship or the voyage*. In *Pole v. Fitzgerald*, decided in the House of Lords, 5 *Bro. P. C.* 137-142, it was held that the insurance was of the ship, and not of the

voyage, and hence if the ship arrived safe, there could be no abandonment although the voyage was lost. But the King's Bench, under the lead of Lord Mansfield, afterwards established the contrary doctrine, that where a ship was insured for a specified voyage, a loss of either the ship or the voyage, was the same thing, and justified an abandonment. The principle settled in *Pole v. Fitzgerald* having been mentioned approvingly in *Goold v. Shaw*, 1 *John. cases* 293-309, and adopted in England in *Hadkinson v. Robinson*, 3 *Bos. & Pul.* 388, and in 2 *Maule & Selwin*, 239, may now probably be considered as generally adopted. A loss of the voyage as to the cargo is not so as to the ship, for a policy on a ship is an insurance upon that for the voyage, and not one on the ship and the voyage. And if an insured ship be so injured by a peril insured against, as to prevent her proceeding, and thus the voyage be lost, it is a total loss of ship, freight, and cargo.

§ 572. Care must be taken to distinguish the difference between an insurance on the ship and one on the cargo. A total loss of the latter may arise not only out of its destruction, but also out of the total incapacity of the ship to perform the voyage. But a temporary loss or retardation of the voyage will not amount to a total loss of the cargo unless it be of a perishable nature. It must not, therefore, be assumed that if the voyage is lost, there can be an abandonment of the cargo. Neither is the latter necessarily connected with the ship; but where the ship was forced back by stress of weather, and the cargo was found in such a damaged condition that it could not be sent on with safety, an abandonment was held good. *Gernon v. Royal Exchange Assurance*, 6 *Taunt.* 383.

§ 573. There is no little amount of difficulty experienced in settling, in a contested case, whether the right to abandon exists or not. It is said that a loss to a greater extent than a moiety will justify an abandonment. But what will justify the conclusion that there is such a loss? Is it the informa-

tion of the assured to that effect, or must it be the actual facts existing at the time? Is it strong probabilities upon which the assured is at liberty to act, or must he go further, and anchor his convictions only within the empire of certainty? The former is very clearly the English rule. In this country there is a strong disposition, and the tendency seems to be to adopt the latter. From an examination of the English and American cases, Mr. Justice Story, in *Peele v. Merchants Insurance Company*, 3 *Mason*, 27-36, says: "If there be any general principle that pervades and governs them, it seems to be this, that the right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and object of the voyage. In such case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost."

§ 574. That there now is, or eventually will be, a real difference between the English and American doctrine, in accordance with the questions asked in the last section, is rendered pretty clear from the difference of doctrine between the two now held in reference to the character of the abandonment itself. The English construction of this is—that if an abandonment be rightfully made, it is not absolute, but may be controlled by subsequent events; so that if the loss has ceased to be total at any time before action brought, the abandonment becomes inoperative. This is carrying out logically the principle of allowing the assured to act upon the highest probabilities in making the abandonment. The American rule, on the contrary, is that "an abandonment once rightfully made, is binding and conclusive between the parties, and that the rights flowing from it become vested

rights, not to be divested by any subsequent events ;” thus carrying out logically the principle of requiring the assured to base his action, in making the abandonment, only upon actual facts and certainties. The English rule, however, has been a good deal shaken, having been doubted in the House of Lords by Lord Eldon in *Smith v. Robertson*, 2 *Dow's Rep.* 474, and still more in *Holdsworth v. Wise*, in 7 *Barn. & Cress.* 794.

§ 575. The first thing the assured is called upon to do after the occurrence of the disaster is to examine the subject-matter insured to ascertain the extent of the injury, and, if the case be a proper one, to determine whether he will or will not abandon. As the American rule requires his action to be based only on actual facts and certainties, and not upon mere opinions and probabilities, it is necessary for him to make a very thorough examination, and to come to such a conclusion as the facts will fully sustain. If his conclusion be to abandon, the next thing is to give prompt notice to the insurer of such his determination, and a failure to do this will be considered as waiving his right to abandon, and limit him to recover only for a partial loss. His omission, however, will not be construed into an admission that the loss is less than a moiety of the value, but he will be at liberty to recover on all, except memorandum articles, what he can show to have been the actual injury. The insurer, upon receiving notice of the loss and abandonment, must decide promptly upon his reception or rejection of it, and if he rejects it, must give immediate notice to the assured.

§ 576. The abandonment must be of the whole or nothing. It must be an unconditional cession or surrender of the subject-matter insured, and all the rights of the assured in relation to it to the insurer. It may be by parol or by a written notice, but in either case should state the ground upon which it is made, describe the disaster which occasioned it, and disclose truly the nature and extent of the

injury. All inquiries made by the insurer relating to the peril insured against, which produced the loss, and to the nature and extent of the injury, the assured is bound faithfully and fully to answer.

§ 577. The effect of an abandonment made and accepted is to divest the property of the assured in the subject-matter, and to vest it wholly in the insurer. The former can subsequently act only as the agent of the latter. A question of some difficulty has arisen as to the party entitled to freight where there has been an abandonment of the vessel short of the place of destination, and by means of repairs the insurer has been enabled to complete the voyage, and deliver the cargo. The question here presented will be the same whether the freight and ship have been separately insured or not. The only difference that would make would be in the parties, the insurer of the freight, in case of its insurance and abandonment, possessing the rights and standing in the place of the insured. Does the entire freight, in case of the abandonment of the vessel and acceptance by the insurer, the same then being in the process of earning, but not completely earned, belong to the insurer, or must it be distributed between him and the assured, in the proportions in which they have respectively performed the voyage? This question involves a great and very important principle, and has been settled differently in this country and in England. In the State of New York it was decided by a divided court in *The United Insurance Co. v. Lenox*, 1 *John. cas.* 377, and affirmed by a majority of the Court of Errors in 2 *John. cas.* 443, that in case of abandonment and acceptance of the ship, and the voyage is subsequently performed, and the freight earned, the insurer is only entitled to that proportion of the freight earned subsequently to the abandonment, the other portion belonging to the assured. This decision was carried against the opinion of Chancellor Kent. The question has more recently come up in England in *Case v. Davidson*, 5 *Maule & Selwin*, 79, and affirmed in 2 *Brod.*

& *Bing*. 379, in which there were two separate insurances, one of freight, and another of the ship, and accepted abandonment of each, and it was held that "*an abandonment of the ship transferred the freight as an incident to the ship, and that an abandonment was equivalent to a sale of the ship to the abandonee.*" This must certainly commend itself as the sound *legal doctrine*, although the *equitable* may be found in the view taken by the New York Courts.

§ 578. A *partial loss* is where a part only of the subject-matter of insurance meets with an injury. Under some circumstances that which was once total may become partial, as where a ship is captured and subsequently escapes or is recaptured. The escape or recapture converts that which was once total, into a partial loss. Under our rules, however, if, while captured, there was an accepted abandonment, that would effect a transfer of the property, and prevent a total loss from ever becoming partial.

§ 579. The point the most difficult to arrive at in case of partial loss, is the amount of the injury, the sum to be paid. There are several questions to settle in order to get at this. The first is the true value of the subject put at risk; the estimated value in a valued policy may not be conclusive upon the parties in a case of loss. In determining this question, which shall be taken as the true test—the sum at which the goods insured would have been sold had they reached the place of destination, thus making good to the insured his profits as well as outlay of capital; or the market value of the goods at the time and place at which the risk was commenced, and the expenses then incurred? This latter would replace the assured in the same position he occupied before undertaking the adventure. Although the first is not without its advocates, yet the last, upon the principle that insurance is a mere indemnity and nothing more, is now the settled rule in England and in this country. When the invoice price of the goods is equivalent to the market value at the time and place where the risk is under-

taken, that is the valuation adopted. The invoice price, prime cost, and market value, are in most cases equivalent terms, and in *Le Roy v. United Insurance Company*, 7 John. 343, the court adopted the prime cost of the goods as being the best rule to test this value in reference to insurance. To this should be added the premium of insurance and commission, and all other expenses then necessarily or usually incurred. The value of the goods thus ascertained, is the important element in arriving at the lesser value to which they are reduced by the injury sustained.

§ 580. The goods, after being damaged, may be carried forward to their place of destination, and then the question may arise how the amount of loss shall be ascertained. The amount payable by the insurer is then arrived at by ascertaining the sum at which the goods would have sold if they had been uninjured, and the market value of them in their damaged state, and deducting the latter from the former. This does not afford a perfect indemnity, because we have here another disturbing element, and that is freight. The carrier has now earned the price of carriage, and that is payable the same whether the goods are damaged or not. This, although treated somewhat as an open question, seems generally understood to be not recoverable of the insurer; and to remedy this, the true way for the owner is to insure the sum to be paid on the freight and charges at the port of delivery.

§ 581. Unless there is a stipulation to the contrary contained in the policy, all adjustments of a general average in foreign ports, are conclusive both upon the insurer and the assured. In settling the amount of losses upon memorandum articles, if the limitation in the policy is five per cent., the great point is to determine whether the amount of injury comes up to, or falls below the point of limitation. If the partial loss comes up to that point, the insurer pays it, together with all the expenses in arriving at it. If it falls below it, he pays nothing, the assured losing not only the

amount of damage, but also all the expenses of the investigation.

§ 582. The adjustment of loss is only final between the parties upon the supposition that all the facts bearing upon it have been fully disclosed, that the parties are laboring under no mistake, and that no fraud has been practised by either party. If either one of these proves not to have been true, a re-adjustment may be had of the matter. In the case of injury to a vessel insured, the old materials are applied towards the payment of the new, as far as they will go, and by deducting their value from the gross amount of the repairs, and allowing the deduction of one-third new for old upon the balance, the amount due from the insurer will be ascertained. In regard to the latter deduction, no difference is made in this country if the vessel injured be new, although in England it is not allowed in such case to be made. Where a peril insured against forces a vessel into port to be repaired, all the expenses attending the repairing are borne by the insurer.

§ 583. As payment in advance of the premium is usually required as the condition of insurance, the cases are not unfrequent in which the assured may enforce its return. This may occur in the following cases :

1. Where the contract of insurance turns out to have been void *ab initio*.

2. Where, for any reason, the risk has never commenced.

3. Where the assured turns out to have had no interest in the subject-matter insured

4. Where the vessel never sailed on the voyage insured, or the policy became void by the failure of the warranty.

5. If the insurance cover a larger interest than the assured possessed, there may be a ratable return of the premium. But the premium will not be returned if the risk once commences, or if there be any fraud on the part of the insured, or if the trade be, in any respect, illegal.



## QUESTIONS.

What is the first point to be settled in case of loss? What must be first ascertained? How many kinds of total loss? What are the two kinds? What are the instances named, and of which kind? What is the rule in relation to the right to abandon? When can there be a separate abandonment of part of the cargo? What is the value here meant? How is the amount of the injury done to the ship determined? When a ship is insured for a voyage, which is insured, the ship or the voyage? What results, if insured ship is so injured as to lose the voyage? Why is it necessary to distinguish between insurance on ship and one on cargo? Is the cargo so connected with the ship that a loss of one necessarily leads to that of the other? What will justify the conclusions that goods or ship are damaged to the extent of a moiety? Is it information or actual facts? Strong probabilities or certainties? What is the English rule? What the American? What is the English rule relating to abandonment? What the American? What does each logically carry out? What is the first thing the assured is called upon to do after the disaster? If his conclusion is to abandon, what is the next thing he is to do? What is the consequence of failure to do this? Is his failure regarded as any admission? What will he be at liberty to recover on? What must the insurer do upon receiving notice of abandonment? What if he rejects it? What must the abandonment be of? What must it be? How may it be done? What should the notice state? What should it describe? What disclose? What the duty of the assured in relation to answering questions? What is the effect of an abandonment made and accepted? In what capacity does the assured subsequently act? Where, after abandonment and acceptance, the remainder of the voyage is performed, who is entitled to the freight? What is the American rule? What the English? What is a partial loss? Can that which is total ever become partial? How? How is it under our rule? What is the most difficult point in case of partial loss? What is the first question to be settled? Is the estimated value conclusive? What is the true test taken to arrive at value? At what place and time is the value to be determined? And what value? What must be added to value? What would the effect of this be? When the invoice price and market value are the same, what is the valuation adopted? What, in this respect, are generally equivalent terms? What, in such case, does the court adopt? What should be added? What next to the value is to be arrived at? Suppose damaged goods are carried forward to the place of destination, what question then arises? How is the amount payable by the insurer then arrived at? Why does not this afford a perfect indemnity? How may this difficulty be reme-

died? What effect have adjustments of general average in foreign ports? How are losses upon memorandum articles settled? At whose expense? Upon what supposition are adjustments upon loss between parties final? When may a readjustment be had? What may be done in case of injury to a vessel? How loss ascertained? Where vessel is forced into port to be repaired, who bears the expenses of repairing? What are the cases in which a return of the premium may be enforced by the assured? What, if insurane cover a larger interest than insured possessed? When will premium not be returned?

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## II. FIRE INSURANCE.

This is a contract by which the insurer, in consideration of the premium, undertakes to indemnify the insured against all loss or damage which may occur to his houses, buildings, furniture, stock, goods or merchandise by means of accidental fire happening within a prescribed period.

### PART I.

#### INSURABLE INTERESTS.

§ 584. The law will enforce no wager policies against fire. The party insured must have some interest in the subject-matter not only at the time of the insurance, but also at the time of the loss. But as the law allows different persons to have different and distinct interests in the same property, so it will permit each to protect his interest by means of insurance. One familiar instance illustrating this is the case of mortgagor and mortgagee. Each has an insurable interest in the same property, as has also the assignee of a mortgagee, who is in the occupancy of the premises. The question has arisen whether the mortgagee had any insurable interest remaining after a sale by a master in chancery under a decree of foreclosure, a fire having destroyed the building insured between the time of sale and the enrolment of the decree and execution and delivery of the deed; and it was held that he had not, the deed when given

relating back to and having legal effect given to it from the time of the sale. *McLaren v. The Hartford Fire Insurance Company*, 1 *Seld.* 151. Another instance of double insurance upon the same property occurs in the case of commission merchants, who, by virtue of their interest in their commissions, are entitled to insure, while the principal or consignor, being the owner, has also a right to insure. The commission merchant, in such case, may insure even to the full value of the goods. *De Forest v. Fulton Fire Insurance Company*, 1 *Hall, N. Y. Rep.* 84.

§ 585. A question has arisen as to the insurable interest of a party occupying premises under an agreement to purchase, and having therefore merely an equitable, but no legal interest, and it has been held that such a party could insure, and, in case of loss, recover the full value of the building to the extent of the insurance, although the vendor had insured the same building in his own name. *The Aetna Fire Insurance Company v. Tyler*, 16 *Wend.* 385. And in the *Columbia Insurance Co. v. Lawrence*, 2 *Peters*, 25, it was held that such a party had an insurable interest, although his vendor had a power under the contract to treat the sale as rescinded. Where a person is merely interested in the rent of buildings, he may insure that from loss by fire within the prescribed period.

#### QUESTIONS.

What is fire insurance? Can wager contracts be here enforced? What must party insured have? And when? Can different parties have interests in the same thing? What does the law allow about the right to insure? What instance in illustration? Has mortgagee any insurable interest after sale by master, and before decree enrolled and deed given? What does deed relate back to? Who may insure in case of commission merchants? To what extent may commission merchants insure? What instance of equitable estate will give interest sufficient to insure? Can the owner of premises contracted to be sold, insure? Is equitable interest sufficient where vendor can treat sale as a nullity? Can an interest in the rent of buildings be insured?

## PART II.

## THE POLICY, ITS CONTENTS, CONSTRUCTION, AND ASSIGNMENT.

§ 586. The inception of the policy is found in the application of the party for insurance. This application should be in writing, and signed by the applicant, or if communicated verbally to the insurer should be by him reduced to writing, and then signed by the party. It should contain a statement of all the facts relating to the subject-matter sought to be insured, which the applicant deems material to the risk, and in addition the answers made by him to all such questions relating to such subject-matter as may be put to him by the insurer. The facts the most usually stated and inquired about, relate to the material of the building, the means of heating and lighting it, material of which the roof is composed, the title or interest of applicant in it, and the liens, if any, that may exist upon it, to what use the building is put, what are its surroundings, the distance from it to any other building or buildings, the material of which other surrounding buildings are composed, the nature and value of the property or effects proposed to be insured, the manner in which they are disposed of, the nature, character, situation, and materials of the building in which they are contained, and whether any other, and what, insurances have been effected and are existing upon the same property. Upon the ascertainment of all the facts, the insurer causes, or himself draws out, a survey of the building, which should exhibit its size, division into rooms, and sometimes situation relative to other buildings.

§ 587. The materials are now obtained for the policy, which is a printed form having blanks to be filled up with the special matter obtained as above stated. The application and the survey, more especially the former, are usually referred to in the policy and made a part of it. Such express reference makes it as much a part of the policy as if it

had been actually incorporated in it, and renders all its statements relative to the situation and uses of the premises express warranties having the same effect as stated in marine insurance. *Jennings v. The Chenango Mutual Insurance Company*, 2 Denio, 75.

§ 588. A representation, in a fire insurance policy, no more than in a marine, is not to be taken as a part of the contract, but is collateral to it, has none of the qualities of a warranty, and requires to be only substantially correct. And there is a material difference between simply referring to an application and survey in the policy, and referring to it as forming a part of the policy. In the first case, it has simply the effect of a representation, and if substantially correct, the policy will be valid, although a condition annexed to the policy was that if the assured should make any misrepresentation, it should avoid the policy. *The Farmers Insurance & Loan Company v. Snyder*, 16 Wend. 481. But in the latter case it is made a part of the policy so as to change what would otherwise be a representation into a warranty. *Burritt v. The Saratoga Mutual Fire Insurance Company*, 5 Hill, 188.

§ 589. The fire policy is always one strictly on time, and hence the commencement and termination of the risk must be stated with precision. As the property proposed for insurance is always open to the investigation of the insurer or his agent, less reliance is usually placed upon the communications of the assured; still the insurer has a right to rely on the representations contained in the application or in the answers to his own questions, and hence if not substantially true, the policy which is based upon them could never be enforced. It is important for the insurer to ascertain the extent of the interest, as his insurance is made in the confidence that the assured will resort to all reasonable precautions to avoid the calamity insured against; and for this he relies principally upon the motive which urges the assured to protect his own property. He is therefore entitled to a

true statement of the amount of interest of the assured ; and hence where the application was to insure a stone mill, belonging to the applicants, describing it as their stone mill, and the insurance was made accordingly, and it afterwards turned out that they were in possession under an executory contract of sale, it was held, that although that was an *insurable interest* yet it was not *the interest* represented, and that if this misrepresentation was material to the risk, the policy was void. The court say that a precarious title depending for its continuance on events which might or might not happen, is not such a title as is described in the offer for insurance. *Columbian Insurance Company of Alexandria v. Lawrence*, 2 *Peters*, 25. The reverse of this principle, however, has been decided in the State of New York in the case of *Tyler v. The Aetna Fire Insurance Company*, reported first in 12 *Wend.* 507, and affirmed on error in 16 *Wend.* 385, in which it was held that a party in possession under a contract of purchase, obtaining insurance on an application representing the house as *his*, and the description of it in the policy is as *his dwelling-house*, is not guilty of such a misrepresentation as will avoid the policy. The prevailing opinion now is, that the assured need not state that his interest in the subject-matter insured is a qualified or a conditional one, unless special inquiries are made of him in reference to it ; but if any such are put, or if he volunteers to make any such representation, his statement must be true, or the policy will be void. If any facts are known to the assured which threaten any impending danger, they must be stated to the insurer, or the policy will be void, although there was no intentional fraud.

§ 590. The policies are usually found clogged with conditions, which, by their terms, are expressly made to constitute a part of the instrument, and in such case they are construed as so many distinct warranties, and hence their literal performance by the assured are so many conditions precedent to a right of recovery. Even a paper which

purports to be conditions of insurance, if annexed to, and delivered with a fire policy, although not expressly referred to by it, is nevertheless to be deemed *prima facie* a part of it. *Murdock v. The Chenango Mutual Insurance Company*, 2 Comst. 210. In this case one of the conditions was, that if the risk shall be increased by any means within the control of the assured, the insurance shall be void; and under this it was held that the assured had no right to erect other buildings on his own premises so as to increase the hazard, and that if he does so, it avoids the policy. This case also settles the effect of a promise of something in the future, when introduced into the application. In the description was "one stove-pipe passes through the window at the side of the building. *There will, however, be a stone chimney built, and the pipe will pass into it at the side.*" This was regarded as a warranty that the chimney should be built within a reasonable time, and that a violation of the engagement would avoid the policy. This, we have already seen, has no such effect when presenting itself in the shape of a mere verbal promise. *Alston v. The Mechanics Mutual Insurance Company in the City of Troy*, 4 Hill, 329. But where there is no provision in the policy to the contrary, the applicant may, at the time of his application, contemplate the erection of a new building nearly adjoining the one insured, and afterwards may proceed to erect it, giving no notice to the insurers, without invalidating the policy. *Gates v. The Madison County Mutual Insurance Company*, 1 Seld. 469.

§ 591. A very common provision found in a fire policy is a prohibition of the use of camphene in the building insured, and whenever this condition is inserted, its prohibition forms a part of the contract, and partakes of the nature of warranty, and this, if violated, whether its breach affects the risk or not, avoids the policy. It even has this effect although its use is discontinued for some time before the occurrence of the fire. The position taken in the jurisprudence

of New York, is "that the only safe rule is to hold the contract of insurance at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has, by some act or line of conduct, waived the breach or violation of the warranty." *Mead v. The North-western Insurance Company*, 3 *Seld.* 530. This is very important doctrine, and cannot be stated as universally acquiesced in. Indeed a principle directly the reverse is established in English jurisprudence, as *Chief Justice Abbot* in *Weir v. Aberdeen*, 2 *Barn. & Ald.* 320, with the concurrence of the other judges, held that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss may be recovered under the policy. Thus, on this point, English and American jurisprudence are directly at issue. In a very recent case, it has been held that a prohibition of camphene relates only to its use as a lighting material, and hence that the use of it in a printing establishment for cleaning type, which is customary among printers, does not render void a policy of insurance upon printing and book materials, stock, paper, &c., contained in certain buildings occupied for a printing office, bindery, and book store, in the city of New York. *Harper v. The Albany Mutual Insurance Company*, 17 *New York Rep.* 194.

§ 592. Another condition usually inserted in policies provides that if the insured has procured any other insurance upon the same property, and has not notified, and had the same indorsed upon, the one then insured, the same should be void. The object of this is to prevent the accumulation of insurances, thus not only taking away the motive to preserve the property from loss, but also furnishing a strong one for its destruction. Under this condition two questions have arisen. *First*, what is the meaning of "any other insurance upon the same property?" and the *second*, what kind of notice is a compliance with the condition? In regard to the *first*, it is held, that where persons are the



owners of different interests in the subject of insurance, each one may insure his own without giving notice that another and distinct interest has been insured by another. And so far has this principle been carried, that where the provision was "of any other insurance made on their behalf on the same," it was held limited to any other effected at the instance, and upon the authority of the assured; and hence that an insurance made on his account by another without his knowledge, authority, or subsequent recognition, was not one made within the clause. *Franklin Insurance Company v. Drake*, 2 B. Monroe, 47. But a more difficult question has arisen respecting the construction to be put upon an insurance obtained by a mortgagor, and assigned by consent of the company to the mortgagee. The questions here are, whose interest is covered by such a policy, that of the mortgagor or of the mortgagee? And if that of the former, is it such an insurance of the interest of the mortgagor as requires him to give the notice required in the condition when he obtains a second insurance? The construction to be put upon such an insurance has come up for consideration in *Carpenter v. The Providence Washington Insurance Company*, 16 Peters, 495, and in *Robert v. The Traders' Insurance Company*, 17 Wend. 631, 636-7, reversing the decision of the Supreme Court as reported in 9 Wend. 404, and both substantially holding that it was the interest of the mortgagor, and not of the mortgagee, that was thus insured, and that a failure by the former to give notice of such a policy on obtaining a second insurance avoided the policy obtained on such insurance. The question relating to the kind of notice required, also came up for consideration in the case reported in the 16 Peters, 386, and it was held that a parol notice was not sufficient, but that it was necessary in case of any prior policy that the same should not only be notified to the company, but should be mentioned in, or indorsed upon the policy, otherwise the second insurance would be of no effect. Where, however,

the provision was of any other insurance, *not notified to the corporation*, a verbal notice was held sufficient. *McEwen v. The Montgomery County Mutual Insurance Company*, 5 *Hill*, 101.

§ 593. Another condition generally introduced, relates to future insurances, and requires that if any such shall be made, reasonable notice shall be given, and the same shall be indorsed on the policy, or otherwise acknowledged or approved in writing. One question arising here, relates to the sufficiency of the approval, and it has been held that where a reasonable notice was given, and a letter from the secretary of the company received in reply, saying “*I have received your notice of additional insurance*,” and containing no expression of disapproval, was a sufficient *acknowledgment* and *approval in writing* to satisfy the terms of the policy. *Potter v. The Ontario & Livingston Mutual Insurance Company*, 5 *Hill*, 147. The doctrine here established is, that the making further insurance did not work a forfeiture of the policy, unless the plaintiff neglected to give notice with all reasonable diligence; that on receiving notice, it was for the defendants to say whether the contract should terminate or not; and that until they made the election, the policy continued in force. It seems now generally to be understood that a parol notice is always sufficient, provided nothing is said in the policy as to the manner of notification, and it should also be added, no provision that it shall be indorsed on the policy. A very interesting and vastly important question arising out of double insurance, is this: A policy is effected in one office containing the usual clause to protect against double insurance, and afterwards one is effected in another office, containing the same clause, and no notice is given to either company. Has the assured any remedy upon either policy, and if so, which? This question has twice arisen in Massachusetts, first in *Jackson v. Massachusetts Mutual Fire Insurance Company*, 23 *Pick.* 418, and second in *Clark v. The New England*

*Mutual Fire Insurance Company*, 6 *Cush.* 342, in both which cases the doctrine was settled to be that the second policy being utterly void, and the same as if no policy had ever been effected, can have no effect upon the first, and hence that the only remedy of the assured is upon the first, which is perfect. This doctrine may now probably be regarded as the settled doctrine, notwithstanding the doubt thrown upon it in *Carpenter v. The Providence Washington Insurance Company*, 16 *Peters*, 386. As upon the point whether the second policy is voidable or void, Mr. Justice Story, in the last-mentioned Massachusetts case, is shown to have promulgated a different doctrine from what he had himself declared in 1 *Story's Rep.* 57.

§ 594. There is still another condition growing out of the possibility of double insurances that is often inserted in policies, and that is a clause providing that if another insurance is effected, and a loss occurs, the insured shall not receive on this policy any greater proportion of the damage sustained than the amount then insured shall bear to the whole amount insured upon the same property. The law, in such case, is laid down in *The Howard Insurance Company of New York v. Scribner*, 5 *Hill*, 298-301: "A may insure the same subject against fire in several offices, to any amount, due notice being given to each, and the fact noted on the respective policies. The effect is, that each office then stands in the relation of co-surety with the other, according to the several amounts for which they undertook, just as if they had all underwritten the same policy. The several policies are considered as one. Stopping here, therefore, the insured may sue and recover on one or more of them, to the extent of his entire loss, if the sum subscribed will cover it; and those who pay the loss may compel contribution for the payment from the others, in the proportion that each of the sums subscribed by them bears to the whole amount of subscriptions. To avoid this circuitry, the clause in question was introduced. By this, the double

office of recovery and contribution is performed in a single action; the defendant being allowed to recoup the same amount which he must formerly have recovered over against those who stood by his side. The clause in question was probably intended to substitute proportional abatement for contribution, in all those cases in which the latter would otherwise have been required by the common law." The limitation in this case, however, is to the same identical property, and hence where \$1,000 were insured on *fixtures*, and \$3,000 on *stock*, and another policy was obtained insuring \$5,000 on the *stock and fixtures*, as one parcel, it was held not a case of double insurance, and that each company was held to the full amount of its insurance. See also *Harris v. Ohio Insurance Company*, 5 Ohio, 461.

§ 595. Other conditional clauses frequently introduced, classify the goods to be insured, denominating one class as *not hazardous*, another as *hazardous*, and another still as *extra hazardous*, and the two last are also often applied to certain trades and occupations. The condition may be that the building to be insured shall not be used for the carrying on of certain trades, or the storing of certain goods termed *hazardous* or *extra hazardous*, without the consent of the insurer, or an extra per cent. of premium. One effect of the classification into *hazardous* and *extra hazardous* is to throw all those which are not enumerated into the class of *not hazardous* on the principle of *expressio unius est exclusio alterius*. The prohibition contained in a condition against "storing and keeping hazardous articles" is not broken by a mere casual deposit of the articles. *Hynds v. The Schenectady County Mutual Insurance Company*, 1 Kern. 554. Neither is the temporary introduction of hazardous articles for the purpose of repairs, a breach of a condition which prohibits trading in or storing such articles; the object of the prohibition being held simply to prevent the building from being habitually used for the prohibited trade or purpose, and the habitual deposit in store of the prohibited ar-

ticles, and not their occasional introduction for the purpose of repairs and painting. *O'Neil v. The Buffalo Fire Insurance Company*, 3 Comst. 122. In the same case it is also held that a warranty may be either affirmative or promissory, but that in an application in which the premises were described as *occupied by a certain individual as a private residence*, that did not amount to a warranty of the continuance of the occupation during the risk, and hence the insurers were liable, although during a portion of the time insured the premises were unoccupied.

§ 596. In respect to the fulness and fidelity of answer required to questions proposed, the doctrine is, that whether the inquiry, in its fullest sense, does or does not call for more than the answer gives, yet if the applicant answered as he understood it, and the insurers, without objection, accept the application and issue the policy, they will not be permitted, after a loss, to resist the payment on the ground that the answer was not full. And hence when the question was, How bounded, and distance from other buildings, if less than ten rods, and for what purpose occupied, and by whom? and the answer stated the nearest buildings on the several sides of the insured premises, but did not state all the buildings within ten rods; the answer was held not to be a warranty that there were no other buildings within that distance than those mentioned. *Gates v. The Madison County Mutual Insurance Company*, 2 Comst. 43. Same case, 1 Seld. 469.

§ 597. The policy sometimes contains a provision that the insurers would be liable for fire by lightning, and then the question may arise: When are all the conditions so complete that the insurer is liable? The insurance in such case is held to be against fire in the popular meaning of the term—actual ignition or burning, and not against the mechanical effects of lightning; and hence where such a provision was contained in the policy, and the building was struck by lightning, prostrated, and destroyed, but no igni-

tion or combustion took place, the insurers were not held liable for the loss. *Babcock v. The Montgomery County Mutual Insurance Company*, 4 Comst. 326. A condition will protect the insurer, although the loss be not directly owing to the cause specified in the policy. It is sufficient if it can be traced directly to the cause; as where the policy contained a condition that the insurer would not be liable for any loss occasioned by the explosion of a steam-boiler; and there occurred an explosion in the building where the property was situated, by means of which a fire was brought in contact with the insured property and consumed it. Held the loss was fairly within the exception created by the condition, and the insurer could not be held liable. *St. John v. The American Mutual Fire & Marine Insurance Company*, 1 Kern. 516. And where the clause in the policy insures against loss or damage by fire, a loss which results partly from the explosion, and partly from the combustion of gunpowder, is within the protection of the clause. *Scripture v. Lowell Mutual Fire Insurance Company*, 10 Cush. 356.

§ 598. All warranties and conditions have applied to them a strict rule of construction, and provided they appear upon the policy, it is entirely immaterial how, whether they are written upon the face of it, or in the margin, or transversely, or even on a subjoined paper referred to in the policy. The rule of construction, however, is always made to accommodate itself to the peculiar circumstances of the case, and hence where a condition was inserted prohibiting the use of the building for *storing therein* goods denominated hazardous, the keeping such goods as oil, or spiritous liquors, by a grocer, in ordinary quantities, for his ordinary common retail, was held not to be a storing them within the policy. *Langdon v. New York Equitable Insurance Company*, 1 Hall, 226. The English rule of construing qualifying clauses inserted in the policy has been far more strict and severe than the American, holding in *Stokes v. Cox*, 37 Eng. Law & Eq. 561, that a change in the condition of the prop-

erty as described at the date of the policy, though not in terms forbidden, would yet avoid the policy, whether it increased the risk or not. The American doctrine is much less strict in this respect, and changes which are not expressly forbidden, will not have the effect to vitiate the policy, unless they are either fraudulent or occasion the loss. The question as to whether there has been any material increase of risk by addition or alteration of building, when that is provided for in the policy, is regarded as one of fact, and hence to be submitted to a jury. *Grant v. The Howard Insurance Company of New York*, 5 *Hill*. 10.

§ 599. All representations made by the insured to the insurer which are material to the risk, and are false and fraudulent, vacate the policy at the election of the insurer. But the point still remained for decision, as to the effect upon a policy, of fraudulent representations made by the assured to the insurer upon his application for it, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk. That question has only recently been presented, and it was held that such representations did avoid the policy. *Valton v. The National Fund Life Assurance Company*, 20 *New York Rep.* 32. A question has also recently been presented, testing the effect of an omission in a statement, where the applicant described the building to be insured as a stone dwelling-house, but omitted to state the further fact that a wooden kitchen was attached to it. Held, that this omission was fatal to the validity of the policy. *Chase v. The Hamilton Insurance Company*, 20 *New York Rep.* 52.

§ 600. Clauses are usually contained in the policy, rendering it void in case the assured parts with his interest in the property covered by it, and also in case of his assignment of the policy without consent of the insurer. The first is unnecessary, as the interest of the assured in the subject of the insurance is essential to support the policy, and when, therefore, he parts with it, the policy itself be-

comes a dead letter. Hence, if the assured sells the subject of insurance and retains the policy, the risk of the insurer terminates, and he is liable to no one in case of loss. Under these prohibitory clauses it has sometimes become necessary to determine what is, or what is not, a sale; and in a case where the charter prohibited an *alienation by sale or otherwise*, it was held that a mortgage was not a sale. *Conover v. The Mutual Insurance Company of Albany*, 1 Comst. 290. *Folsom v. Belknap County Mutual Fire Insurance Company*, 10 Fost. 231. The points of difficulty generally presenting themselves relate to the assignment of the policy. In reference to this, the question is clearly settled that where the prohibition against assigning is found in the policy, it is only operative during the continuance of the risk, and that an assignment after a loss, and the accruing of a cause of action against the insurer, is in reality no more than the assignment of a debt, and transfers all the right of the assured to the assignee. *Mellen v. The Hamilton Fire Insurance Company*, 17 New York Rep. 609. The assignment of the policy, to be any benefit to the assignee, must be accompanied with a transfer of some kind of interest in the subject of insurance to the assignee, and hence when the purchaser, on execution of the property insured, applied to the insurer, and, without stating his purchase, requested an assignment of the policy, that of itself was held sufficient notice that he had acquired, or was about to acquire, some interest in the goods. *Hooper v. The Hudson River Fire Insurance Company*, 17 New York, 424. Without the prohibitory clause, policies are assignable in equity, but the assignee would derive no benefit from it without acquiring some interest in the property against the damage or loss of which it affords an indemnity. It is entirely competent, however, for parties so to word the prohibition against assignment as to destroy all right of transfer without consent of the insurer, as in the following instance: "The interest of the assured in this policy is not assignable without the consent



of the said company in writing ; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect." Held, the assignment without consent, avoided the policy. *Smith v. The Saratoga County Mutual Fire Insurance Company*, 1 *Hill*, 497.

§ 601. The question may arise as to what will be considered a sufficient assignment where the usual prohibition against it is found in the policy, "unless by the consent of the company manifested in writing," and it is held that where the secretary, on application to him at the office of the company, endorsed upon the policy and subscribed a consent, it was proof of sufficient authority to do so, where there was no contrary evidence. And that the fact of his being sole agent of the company, transacting its business at their office, and habitually giving such consent in writing, and entering the same in the books of the company without objection or repudiation, would be evidence sufficient without showing an appointment by a formal resolution of the Board of Directors. *Conover v. The Mutual Insurance Company of Albany*, 1 *Comst.* 290.

§ 602. A question growing out of valid assignments of policies much more important than any yet considered, relates to the nature and effect of the assignment, and the manner and extent to which the subsequent acts of the assignor can affect the assignee. The facts giving origin to this question are generally these. The owner of property insured mortgages it to another, and, having obtained the written consent of the insurer, duly assigns the policy to the mortgagee. Subsequent to the assignment he obtains another policy of insurance, omitting to give notice to the insurer, or does or omits some other act, which, as to him, would render void the insurance. What effect has such act upon the rights of the assignee? Until the year 1858, the course of judicial decision in the State of New York had been uniform, that no act of the assignor done or omitted

subsequent to an assignment with the written consent of the insurer, could impair or destroy any right of the assignee under the assignment. The principle assumed was, that the assignment of the policy with the assent of the insurer, creates new and mutual relations and rights between the assignee and the insurer, which cannot be changed or impaired by the acts of a third person, over whom the insured party has no control. This principle had been directly affirmed in *Robert v. The Traders' Insurance Company*, 9 Wend. 404. The same case afterwards went to the Court of Errors, see 17 Wend. 631, but upon a different point. It had been approved, although not discussed, in *Conover v. The Mutual Insurance Company of Albany*, 1 Comst. 290-293; and again in *Murdock v. The Chenango County Mutual Insurance Company*, 2 Comst. 218-219; and again directly decided in what appears to have been the unanimous opinion of the Court of Appeals, in *Tillou v. The Kingston Mutual Insurance Company*, 1 Seld. 405. In 1858, during the same term of the Court of Appeals, this question was presented in two cases, viz.: *Grosvenor v. The Atlantic Fire Insurance Company of Brooklyn*, 17 New York Rep. 391, and in *The Buffalo Steam Engine Works v. The Sun Mutual Insurance Company*, 17 New York Rep. 401, in which the doctrine theretofore settled, after a good deal of consideration was overturned; the assignment, with the assent of the insurer, was denied the effect of a new contract between the assignee and the insurer; and, as a resulting consequence, the assignee was held chargeable with all the acts and omissions of his assignor, as affecting his remedy against the insurer. This doctrine was settled by a divided court, five to three, in both cases reversing the decision of the Supreme Court. Whether this radical change in the view taken of the nature and effect of assignments of policies of insurance, resting, as it really does, upon the conclusions arrived at by one of the judges of the Court of

Appeals, will continue to be acquiesced in, and thus rendered permanent, remains yet to be seen.

## QUESTIONS.

Where is found the inception of the policy? How should the application be? How signed? What should it contain? What in addition? What are the facts the most generally inquired about? What next, upon ascertainment of the facts? What is the policy? What are made parts of it? And how? What is the effect of express reference? How is a representation taken and what required in relation to it? Is there any difference, and what, between referring to an application and referring to it as a part of the policy? What is a fire policy as to time, and what necessary to be stated? What has the insurer a right to rely upon as to representations and answers? Why should the insurer ascertain the extent of interest of the insured? What is he entitled to in relation to it? What illustrations? When is applicant only bound to state his interest? How must he answer inquiries, or make voluntary statements? What duty in relation to facts that threaten impending danger? What are fire policies usually clogged with? What a part of? How construed? How performed by the assured? How regarded? How paper containing conditions made a part of a fire policy? What illustration? What the effect of a promise in the future? What illustration? Any difference whether same be verbal or in writing? What effect of provision prohibiting use of camphene in building insured? What effect, if use be discontinued some time before fire? What the principle settled? What the doubt in relation to it? What does a prohibition of camphene relate to? What instance in illustration? What the provision usually inserted relative to other insurances and notice? What the object of it? What questions have arisen? What is held in regard to the first? How far has this principle been carried? What illustration? What construction to be put on effect of assignment of policy by mortgagor to mortgagee with consent of company? Does mortgagor, in such case, retain any insurable interest? What necessary in case of subsequent insurance by mortgagor? What kind of notice necessary? What provision in relation to future insurances? What is here a sufficient approval? What illustration? When is a parol notice sufficient? What important question arises out of double insurance? Upon which policy has the assured a remedy? What provision as to apportioning insurance moneys is sometimes inserted in policies? What the law where there is such provision? What the limitation? What clauses introduced as to classifying hazards? Into what classes classified? What the applications some-

times made? What the provisions sometimes in regard to lightning? What does fire by lightning mean? What excluded? Will provision protect insurer if loss be not directly owing to the cause specified in the policy? What illustration? What constructions applied to warranties and conditions? What must they appear upon? How may they be written? What does the rule of construction accommodate itself to? What illustration? What difference of construction between English and American jurisprudence? What kinds of representations vacate policy, and at whose election? What is the effect upon a policy of fraudulent representations not material, but which are so in the judgment of the insurer? What clauses avoid policy by reason of parting with interest in subject insured, or of assigning policy? What necessity of first provision? What result if assured sells subject-matter, and retains policy? What are the points of greatest difficulty? When is prohibition against assigning policy only operative? Can there be assignment after loss, and on what principle? What must assignment of policy be accompanied by to be of any benefit? What is application for assignment of policy notice of? When are policies assignable in equity? What must assignee possess himself of, to derive any benefit from it? Can parties so word prohibition as to avoid policy in case of assignment, and how? What is sufficient assignment of policy *prima facie*, where there is the usual prohibition? What facts are sufficient evidence without showing formal appointment by board? What facts originate inquiry into effect of assignment and manner in which subsequent acts of assignor affect the assignee? What was the law in the State of New York previous to 1858? What was the principle then assumed? What was the doctrine declared in 1858? What was the effect denied to the assignment? What the resulting consequence?

### PART III.

#### LOSS, AND PROCEEDINGS THEREUPON.

§ 603. In the loss and its adjustment are involved several very important questions. The first relates to the extent of liability of the insurer. The fire policy is generally an open one. It usually provides that the insurers are to make good the loss or damage, to be estimated according to the true and actual value of the property at the time the loss happens. This, it has been held, is the true measure of damages, although at the time of the loss, the goods were subject to

duties which had neither been paid nor secured. *Wolfe v. The Howard Insurance Company*, 3 *Seld.* 583. This provision in the policy, or, in its absence, the legal rule, where there is no special valuation in the policy, will compel the insurer to pay to the assured by way of indemnity, the true and actual value of the property at the time of the loss; and by this is meant its intrinsic value, divested of any special or adventitious circumstances that might tend to increase or diminish its relative value or importance to the assured. If its loss to the assured should, under the peculiar circumstances of the case, occasion him inconvenience and damage far beyond its actual value, still the latter would be all the insurer could be called upon to pay. It is, however, competent for the parties to fix a valuation upon the property at the time of the insurance, and whenever that has been done, the parties, in the event of an absolute loss, are bound by such valuation. As in a case where 380 kegs of tobacco were insured, and on the back of the policy they were stated as worth \$9,600, and 157 kegs were burned: It was held, the insurer was bound to pay for the loss of the 157 kegs according to the valuation which the parties themselves had put upon the whole number. *Harris v. The Eagle Fire Company of New York*, 5 *John.* 368. The same principle was also decided in Massachusetts, although the sum stated in the policy exceeded the value of the interest of the assured. *Borden v. The Hingham Mutual Fire Insurance Company*, 18 *Pick.* 523.

§ 604. There is, in fire insurance, no such thing as total abandonment to the insurer, or any deducting from expenses of one-third new for old, nor in general any such thing as general average, although there may be a general average for a sacrifice made by the insured for the common good, in a case of necessity. The loss by fire is seldom a total loss, and the sum or valuation inserted in the policy is regarded as fixing the maximum sum beyond which the insurer will not be held liable. He will consent, and does, by the execution

and delivery of his policy, to insure so much upon the property. It is all the risk he is willing to run, and if the assured desires a further indemnity, he must seek it of some other insurer. No prudent company will ever take too many heavy risks in the same immediate neighborhood, but will prefer to scatter them about in localities separate from each other. The distinction as to adjustment of loss between fire and marine insurances is well laid down by C. J. Shaw, in *Trull v. The Roxbury Mutual Fire Insurance Company*, 3 *Cush.* 263, 267-8. "In fire policies the assured recover the whole loss, if within the amount insured, without regard to the proportion between the amount insured, and the value of the property at risk; whereas, in marine policies, the insurer pays only such a proportion of the actual loss as the sum insured bears to the value of the property at risk. For instance, on fire policies, if the sum insured be \$2,000 on property worth \$10,000, and the assured sustains an actual loss on the whole, he recovers the whole \$2,000. But in a like case, on a marine policy, he would recover one-fifth only, or \$400; being the proportion which the sum insured bears to the value at risk; the assured himself bearing the other four-fifths of the risk. The result is, that every settlement of a loss by fire is in the nature of an adjustment of a partial loss, although it may amount to the whole sum insured. It is the payment of the whole actual loss sustained, on the whole property at risk, not exceeding the sum insured, without regard to any apportionment between the sum insured and the property at risk, or to any abandonment, or technical or constructive total loss, or salvage."

§ 605. A question of great interest and importance here arises out of the insurance effected by a mortgagee upon the property mortgaged. In case of loss before the payment of his debt, secured by the mortgage, what are the relative rights of mortgagee, insurer, and mortgagor? There is no doubt but that such mortgagee possesses an insurable interest, and that that interest extends to the amount of his

debt. All are agreed further that in case of loss, the debt and mortgage still being unpaid and outstanding, the insurer is bound to pay the amount insured to the mortgagee if it does not exceed the debt. The next step brings us to a controverted point. How does the mortgagee hold this money, and to whom belongs the debt due from the mortgagor? Does he hold it in his own right, still owning the debt, or does he hold it as trustee for the insurer in case of subsequent payment to him of the debt, and is the insurer then entitled to be subrogated to his rights as to receiving or enforcing the payment of the debt? In other words, does the insurer indemnify him against the loss of the debt, or of the property insured? Mr. Phillips, in 2 *Phillips on Insurance*, 2d Ed. 419, lays down the rule to be that the insurer by payment of the loss entitles himself to a proportional interest in the debt secured by the mortgage, and that doctrine is explicitly laid down by Judge Story, in *Carpenter v. Providence Washington Insurance Company*, 16 *Peters*, 495. It is also put forth as correct doctrine by Chancellor Walworth, in *Tyler v. Aetna Insurance Company*, 16 *Wend.* 385. The question, however, did not directly arise, and was not necessary to be decided in either one of these cases, especially the latter. On the other hand, the point was presented and extensively discussed in Massachusetts by C. J. Shaw, in *King v. The State Mutual Fire Insurance Company*, 7 *Cush.* 1, in which he strongly enforces the other view of the question, holding in express terms, "that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; that it is not a payment in whole or in part, but that he has still a right to recover his whole debt of the mortgagor, and that when the debt is thus paid by the debtor, the money is not, in law or equity, the money

of the insurer, who has thus paid the loss, or money paid to his use." A case presenting substantially the same point under a different form has arisen in England, and is found in *Dobson v. Land*, 8 *Hare*, 216, in which Vice Chancellor Wigram holds the same doctrine as the Supreme Court of Massachusetts. This latter case is strongly criticized by an article in 13 *Law Reporter*, 247. The very recent case of *Kernoehan v. The New York Bowery Fire Insurance Company*, 17 *New York Rep.* 428, decides that in the case of insurance of mortgaged property by the mortgagee, the insurer undertakes to indemnify against the loss of the property, and, not of the debt, and although this question is mentioned, yet it was not necessarily involved in the decision which the facts of the case required, nor did the court undertake to adjudicate upon it. In view of all these conflicting opinions, it may perhaps be safe to assume that this question, so important to the business world, is yet an open one in general jurisprudence.

§ 606. Another question of some difficulty, but involving not so much contrariety of decision, relates to the amount of loss the assured is entitled to receive, in case he has only a qualified property in the subject-matter of the insurance. Where, for instance, a commission merchant, or a bailee, having only a qualified property in the goods to be sold, or the thing bailed, insures them on his own account, by virtue of his insurable interest; the question is, whether in case of loss he is entitled to receive the whole amount insured, which may perhaps be the entire value of the property, or is he limited to such sum as would indemnify him for the extent of his interest in the property; or may he receive the whole amount, holding all beyond what is necessary for his indemnity as trustee for the absolute owner? A portion of the same reasoning which, in this case, would carry the whole insurance money to the assured as his own, would sustain the position taken by the Supreme Court of Massachusetts on the question presented in the last section. This



question has twice arisen in the State of New York, and once in England, and it is held that the party insuring, although he may have but a qualified property in the thing insured, is nevertheless entitled, in the event of loss, to receive the entire amount specified in the policy. *Stillwell v. Staples*, 19 *New York Rep.* 401. *Waters v. The Monarch Fire & Life Assurance Company*, 5 *El. & Black.* 870.

§ 607. The policy generally contains provisions prescribing what proceedings must take place on the part of the assured in the event of loss. These require the notice of loss to be immediately communicated to the insurer; and within a reasonable time afterwards, generally specifying what that shall be, preliminary proof, relating to the nature and cause of the loss, stating the extent of it, and the manner in which it occurred, the same to be verified either by affidavit or certificate of the nearest magistrate, one or both, is to be furnished to the insurer. These provisions are thus made a part of the contract, and are to be as faithfully and circumstantially pursued as the nature of the case and situation of the party will permit. The courts, when called upon, have adopted different principles of construction in relation to these provisions. The Court of King's Bench, in *Worsley v. Wood*, 6 *T. R.* 710, adopted a very strict and rigid principle of construction, holding that the procuring the certificate was a condition precedent to the recovery, and that even where the party who was to sign it wrongfully refused to do so. In *Leadbetter v. The Aetna Insurance*, 13 *Maine*, 265, the court adopt the same principle, holding that where the certificate of the nearest magistrate was required, and the certificates of neither one of the two nearest could be obtained, and that of the third, who was the next nearest, was; the assured was denied all remedy, as the production of the certificate of the nearest magistrate was a condition precedent. In the State of New York, the courts have adopted a different principle, construing such provisions with great liberality; requiring only reasonable information

to be given, to enable the company to form some estimate of their rights and duties before they are obliged to pay. The account of loss was deemed sufficient, although in a very general form. *McLaughlin v. The Washington County Mutual Insurance Company*, 23 *Wend.* 525. So where the provision in the policy required the certificate of a magistrate or notary the most contiguous to the place of the fire, C. J. Nelson declined going into a nice calculation of distances to settle the point upon the laws of mensuration; insisting that the spirit of the condition required no such mathematical precision, and that its object is completely secured by the proximity of the certifying magistrate. *Turley v. The North American Fire Insurance Company*, 25 *Wend.* 374. And so in a recent case, where, under a similar provision, the assured produced the certificate of a magistrate residing *near* but *not nearest* to the place, and the insurers objected to paying the loss, *but not on that ground*, it was held that the objection was waived; that if it was to be insisted on, the insurers should have pointed it out, so that a new one could have been supplied. *O'Neil v. The Buffalo Fire Insurance Company*, 3 *Comst.* 122.

§ 608. Another question that has frequently been presented to the courts, relates to the circumstances under which the insurers will be taken to have waived all objection to the insufficiency of the preliminary proofs, and hence to have precluded themselves from taking any advantage of their defects. In one case, where the mortgagee insured the mortgaged premises in his own name, and for his own benefit and that of the mortgagor, the latter paying the premium, and the notice and preliminary proofs were furnished in the name of the mortgagor, and no objection was taken until after suit brought; held, the insurers could not object that they were not in the name of the assured. *Kernochan v. The New York Bowery Fire Insurance Company*, 17 *New York Rep.* 428. In another case it was held that all formal

defects in the preliminary proofs are waived, if the insurers, without noticing them, put their refusal to pay upon some other ground. *McMasters v. The North American Fire Insurance Company*, 23 *Wend.* 43. So in a more recent case, where the company declined paying, but neglected specifically to object to the form or time of service of the proofs, any defects that might exist were held to be waived. *Bumstead v. The Dividend Mutual Insurance Company*, 2 *Kern.* 81. So where the insurers received preliminary proofs that were insufficient, but gave no notice to the assured of their defects, but, without any further notice to the latter, procured themselves, within the time specified, the necessary affidavits, it was held that this was a sufficient compliance with the provision by the assured. *Sexton v. The Montgomery County Mutual Insurance Company*, 9 *Barb.* 191. So, also, partial payment of the loss, by the insurer, is a waiver of the preliminary proofs. *Westlake v. The St. Lawrence County Mutual Insurance Company*, 14 *Barb.* 206.

§ 609. To do the work, and meet promptly the liabilities of the insurer, requires large amounts of capital in such a shape as to be readily accessible. This is seldom undertaken except by incorporated companies, and of these there are two kinds. The one, and much the elder of the two, are *stock companies*, in which the capital stock is created and defined by the charter, and the corporators become such by purchase and ownership of the shares. The sale and payment for the shares gives the corporation the capital required in their operations. A sufficient amount of this is kept on hand for current expenses and payments in case of loss, while investments may be made of such portions as are not immediately required. The profits realized are distributed by way of dividends to the stockholders. These incorporated companies have nothing peculiar to themselves, and are governed by the general principles of law applicable to corporations.

§ 610. More recently, and within the last half century,

another kind of insurance companies have appeared, called *Mutual Insurance Companies*, whose organization is entirely different from the stock companies, and out of which has grown a good deal of litigation. The principle of their construction is simple, although when their machinery becomes deranged in its operation; quite a degree of complication is experienced. The principle is a common contribution of credit, in which is to be found the means of indemnity against individual losses. Upon the organization of the company, the most generally for the effecting of marine or fire insurances, risks are solicited. The party who gets his property insured becomes a member of the company during the period of time for which he insures. He pays down a small sum sufficient to cover the actual expenses of the survey, policy, &c., and executes and delivers to the company a premium note for such amount as they require for the premium of insurance, receiving in return the policy. This is in the usual form of other policies, containing generally the same provisions and conditions, and in addition often making the by-laws of the company a part of it. The premium note pledges the personal liability of the assured to contribute his proportion towards the payment of all losses which the company may be called upon to make good while he continues a member of it, that is, during the period of his insurance. When the losses require it, the company make assessments upon their premium notes, the payment of which, when required, is usually made a condition to the continuance of membership in the company so far as regards their liability for future losses.

§ 611. It will thus be perceived that the capital, at the commencement of business, must consist of the loan or pledge of the credit of those who are insured in the company; and as it is impossible to secure in the outset a sufficient number of small premium notes to make any considerable aggregate amount of capital, it is usual for those the most instrumental in getting up the company, and who are confident of its suc-

cess, to loan their individual credit in much larger sums, either with the expectation of taking out policies in the future, or to enable the company to gain credit with the community. The act of incorporation sometimes makes provision that the company may be authorized to receive notes for premiums in advance, of persons intending to receive its policies, and to negotiate such notes in the course of its business. This is the effect of the provision contained in section 5 of the general act authorizing the formation of mutual insurance companies passed by the Legislature of the State of New York in 1849. The ultimate capital stock of these companies is the accumulation of earnings above the losses.

§ 612. The questions arising between the company and the assured in the event of loss, are similar to those arising in all other cases of insurance, except in those respects in which the peculiar organization of the company may require the application of a different principle. One instance of this arises out of the facts of giving the premium note, subsequent forfeiture of the policy, and assessment by the company on the note with a knowledge of the facts causing the forfeiture. What effect has this upon the policy? Are the policies and premium notes independent contracts, each capable of subsisting without the other; or are they so intimately connected that they can only co-exist, and that hence if the company choose to treat the premium note as a valid subsisting one, by making and receiving assessments upon it, with a knowledge of the facts that have caused a forfeiture of the policy, is that of itself a waiver of the forfeiture, and revival of their liability in case of loss? Of this question courts have taken different views, and as one of general jurisprudence, it may, perhaps, still be considered open. See sustaining their independence, *New England Fire Insurance Company v. Butler*, 34 *Maine*, 451, and *Swanscot Machine Company v. Partridge*, 5 *Fost.* 369. And on the other side sustaining their co-existence, and mutual neces-

sity to each other, *Viall v. Genesee Mutual Insurance Company*, 19 *Barb.* 440, and *Wilson v. Trumbull Mutual Fire Insurance Company*, 19 *Penn.* 372. *Frost v. The Saratoga Mutual Insurance Company*, 5 *Denio*, 154, and *Smith v. The Saratoga County Mutual Insurance Company*, 3 *Hill*, 508 ; in which the court held that where the company, with a knowledge of the facts constituting a forfeiture of the policy, had assessed the premium note for losses which had occurred *before the forfeiture*, the policy was not thereby revived.

§ 613. The anxiety to obtain risks, and the zeal of agents paid generally by a percentage on the risks they can procure, or the premium notes or amounts of cash they can secure for the company, has occasioned the transacting of business in so reckless and improvident a manner, as often to result in the utter failures and insolvencies of these companies ; and whenever this occurs, and the effects go into the hands of receivers to wind up their affairs, questions of difficulty often arise between them and their former members, growing out of the notes given on the taking out of policies, or in the expectation of it. Are such notes given upon sufficient consideration as between the company and the makers, and to what extent are they enforceable ? In these cases, in some instances, the charter of the company has authorized it to receive premium notes in advance of persons intending to take out policies, and also to negotiate them in the course of its business, paying to the makers a compensation not exceeding five per cent. per annum on so much of the notes as exceeded the premiums on policies actually taken. A note given under such circumstances has been held valid and enforceable for the sum due on its face, although the premium on insurances received by the maker, amounted to only a part of it. It was held that there was sufficient consideration. *Deraismes v. The Merchants Mutual Insurance Company*, 1 *Comst.* 371. In *Brown v. Crooke & Towks*, 4 *Comst.* 51, the court reaffirm the same principle,

and apply it, although the makers of the notes had given them to the company, stipulating that they "*were to be in advance for premiums on policies of insurance, which they agreed to take thereafter*, and after giving the same, they had taken out no policies. In *White v. Haight*, 16 *New York Rep.* 310, it was held that a note given upon the same principle was not held by the company as a guaranty, and recoverable only to the extent of a just proportion of the losses and expenses, but that it was payable absolutely, and that there was no occasion for an assessment; for, the corporation being insolvent, the receiver,—the plaintiff in the action,—was entitled to enforce all the securities belonging to it for the purpose of paying its debt. It was also held to be no defence that the losses, to which the money if collected, would be applied, occurred subsequent to the period for which the maker of the note was insured, or that in respect to such losses no assessment had been made upon other notes given to the company. The principle is here broadly asserted, that all notes of this character are intended to be actual securities for the money mentioned in them, that they may be collected at maturity, and the amount, if not required for immediate expenditure, should be invested in more safe and permanent securities. In *Savage v. Medbury*, 19 *New York Rep.* 32, it was held that where a note was not one of those given at the formation of the company, under section 5 of the general act, (as was the fact in *White v. Haight*,) an assessment is a necessary condition to the maintenance of an action, by the receiver of a mutual insurance company, against the maker of it, and that the receiver stands in the place of the company, and can recover only when, and to the extent, that the company itself could have done. In *Bangs v. Gray*, 2 *Kern.* 477, it was held that a member of a mutual insurance company, not, however, incorporated under the general act, is liable to be assessed upon his deposit note for losses in the proportion which the amount of his note bears to the aggregate of deposit notes which are

collectable and subject to assessment for such losses ; that if other members, legally assessable, are unable to pay the amounts assessed, those who are able are liable to be assessed to make up all such deficiencies.

### QUESTIONS.

Is a fire policy open or valued? What does it usually provide? What is the insurer to pay in case of loss? What is meant by the rule? Has the assured any claim beyond actual value? Can parties fix a valuation so as to be bound by it? When to be affixed? What illustration? What is there wanting in fire insurance that is found in marine? How is the sum or valuation regarded in the policy? What is the difference as to adjustment of loss between fire and marine insurances? Has a mortgagee an insurable interest, and to what extent, and when does it terminate? Suppose a loss, and the insurance money paid, to whom does it belong? To the assured absolutely or conditionally subject to payment of the debt? And what, if any, are the rights of the insurer in reference to the debt? What is the assured entitled to receive when he has only a qualified property in the thing insured? The whole amount of the insurance, or to the extent of his interest? What provisions in the policy prescribing proceedings in the event of loss? How are these provisions to be regarded, and how pursued? What principles of construction adopted by the courts of England, and some in this country? What adopted by the courts of the State of New York? What illustrations? When, and under what circumstances, are defects in preliminary proofs waived by the insurers? What cases in illustration? How is the capital stock of stock companies created? How do corporators become such? What gives the corporation its available capital? How are the profits distributed? What is the principle upon which mutual insurance companies are organized? What does the party getting his property insured become? And for what period? What does he pay down? What does he execute and deliver? What receive? What is in the policy additional to other policies? What is the effect of the premium note? What do the company do in the event of losses? What does the capital stock consist of at the commencement of business? What beyond small premium notes is it necessary to obtain? What is it usual for those getting up the company to do? What does the act of incorporation make provision for? What is the ultimate capital stock? In what respect are questions, as here arising between the company and the assured, different from those arising in other cases of insurance? Suppose a premium note assessed subsequent to a known forfeiture of the policy,



is that a waiver of the forfeiture? Does it revive the liability of the company? What effect if made on losses previous to forfeiture? What do difficulties between the company and its members usually grow out of? Are such notes given upon sufficient consideration? Under what authority are they commonly given? When given at the organization of a company under the general act, how are they regarded, what their character, when, and to what extent enforceable? When given subsequent to formation of company, what necessary before action can be brought and maintained? In companies not incorporated under general act, in what proportion is premium note liable to assessment, and what deficiencies to be made up, and how?

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### III. LIFE INSURANCE.

§ 614. Life insurance is a contract by which the insurer, in consideration of a certain premium, consisting either of a gross sum or of certain annual payments, undertakes to pay to the person for whose benefit the insurance is made, a certain sum of money or annuity, on the death of the person whose life is insured, or on the happening of an event depending on such life. The engagement may be either to pay a certain sum upon the death of the party whose life is insured, or to insure at a certain sum the continuance of the life for a certain number of years. In either case, the consideration to the insurer may be either a gross sum paid down at once, or the annual payment of a certain sum during the continuance of the insurance. The objects generally sought to be attained are the following:

1. In case of marriage, investments are sometimes required to be made as a provision for a wife and children in case of their survivorship. The securing a certain sum to be paid for their benefit in the event of death, answers as a substitute, allowing the husband, in the mean time, the use of the capital.

2. The husband and father of a family, by means of a

small annual payment, can thus provide for his wife and children in case of his removal by death.

3. Any one unmarried can make a similar provision for friends or relatives.

4. A creditor can, by insuring the life of his debtor, create an additional security for the payment of his debt.

5. A man may strengthen his own credit by procuring his life to be insured a certain number of years, assigning the policy to his creditors. Thus life insurance can be rendered available in a variety of different ways. With slight exception, however, it is only in England and America that the desire of providing for the future has originated and carried into effect this species of insurance.

§ 615. The law will not permit this, more than any other kind of insurance, to be a mere gambling contract. Hence it requires an interest in the life insured to effect a valid insurance. The first inquiry that arises relates to what constitutes a sufficient interest. Any one is held to have a sufficient interest in his own life to make it the subject of legal insurance. So a creditor has such an interest in the life of his debtor as to enable him to insure it upon his own account to the extent of his debt; and a partnership creditor may, upon the same principle, insure the life of either partner. At the time of the creation of the debt it is often made a part of the security that the life of the debtor shall be insured, and the policy assigned to the creditor. It is not, however, every interest in the life of another that is insurable. A person has not, simply in the character of husband and father, an insurable interest in the life of his wife or child. To be sufficient it must be a direct, pecuniary interest. The child has an insurable interest in the life of his father where he is dependent for support upon a fund which ceases at his father's death. A single woman who is dependent on her brother for her support and education, has a sufficient interest in his life to entitle her to insure it. In New York and several of the States, by statute, a married woman may insure in her

own name, or in that of another, with his assent, the life of her husband, and in the event of his death, will be entitled to the proceeds of the policy in preference to his creditors.

§ 616. The policy is issued upon the strength of statements contained in answers to questions by the assured, his friend, his medical adviser, and usually the report of the physician of the company. The questions to which answers are the most commonly required are, the name, residence, and occupation, place, and date of birth; whether he has, at any time, been afflicted with gout, rupture, insanity, liver complaint, fits, or convulsions, and whether he has had symptoms of consumption, spitting of blood, asthma, or any disease of lungs or chest; whether he ordinarily enjoys good health, and is aware of any disorder or circumstances tending to shorten life, or to make an assurance more than usually hazardous. If these statements, or any of them, are incorporated into the policy, or recited, and thus incorporated by reference, they so far become part of it, and thus partake of the nature of a warranty, requiring a literal compliance with the statement, whether the party is, or is not, apprised of its untruth. These statements are not, however, ordinarily spread out upon the policy, but they are frequently so referred to as to be made a part of it. When they are not thus incorporated or made a part of it, they are not regarded as warranties, but simply as representations. In this latter case it is sufficient, if they are made and given in good faith, and are true in substance. If these partake of the nature of a representation merely, they should be material in order to avoid the policy. But if immaterial and fraudulently made, they will still avoid the policy if the insurer, at the time, deemed them material to the risk.

*Valton v. The National Fund Life Assurance Company*, 20 *New York Rep.* 32.

§ 617. Much of the litigation that has occurred in actions brought upon these policies, has arisen out of defences interposed to their enforcement, growing out of alleged violations

of warranty or untruthfulness in representation. The rule is, if there be no warranty, or representation, or fraud, the insurer takes the risk of the goodness of the life he undertakes to insure. If he desires any knowledge beyond what is apparent, he is at liberty to question; and all relevant questions devolve upon the applicant the duty of answering faithfully and truthfully. The answer, however, must be full to the question, and hence in a case where the representations were to be considered a part of the policy, if in the making of those on the strength of which the insurance was effected, a material fact is untruly stated or concealed, the policy will be void, although no specific questions are asked respecting such fact, provided a general question is put which would include, and was calculated to elicit, that fact; and this, although the omission results rather from accident or negligence than from design. *Vose v. The Eagle Life and Health Insurance Company*, 6 Cush. 42.

§ 618. In the absence of any warranty or condition on the part of the assured, the insurer takes all risks, unless he can show a fraudulent concealment or misrepresentation, or a non-communication of material facts known to the assured; and either one of these will avoid the policy. In this kind of insurance much reliance is necessarily placed upon the communications of the insured, especially in relation to his past history, and the diseases or difficulties with which he may have been afflicted, and those which may be considered hereditary in his family. His application for insurance binds him to disclose all material facts within his knowledge; and if he supposes any fact relevant to the matter, he must take the responsibility of its turning out to be immaterial, and hence an innocent concealment; because it is the province of the jury to decide on the materiality of facts, and his own belief, therefore, relating to its materiality or the reverse, is of little or no importance. If he communicates every fact within his knowledge fairly bearing on the question, he has done all the law requires of him, but if he

chooses to speculate on what he can safely communicate and what withhold, he must take the responsibility of the conclusions to which he arrives and upon which he acts. And although it is expressly stipulated that the policy shall be void on untrue answers being given to certain *written* inquiries, thus creating a seeming exclusion as to those which are *verbal*, yet it was held that a *verbal* misrepresentation vitiates the policy. *Wainwright v. Bland*, 1 *Mee. & Wels.* 32. In *Swete v. Fairlie*, 6 *Carr. & P.* 1, a question of great interest was presented as to the effect of the omission to communicate the fact that some years previously the life insured was afflicted with a disorder tending to shorten life, but of a character such as to deprive the individual of all consciousness during its continuance, such as insanity, and it was held the omission was not fatal to the policy. Under the earlier forms of insurance in which the warranty of good health at the time of the contract was the principal warranty relied upon, questions arose as to the effect of former diseases, or of wounds formerly received, as in *Ross v. Bradshaw*, 1 *Wm. Black.* 312, where the statement of them was omitted, and the disease causing death was wholly unconnected with them. The general conclusion was that they did not avoid the policy. At the present time, however, the questions put are of such a searching character, and the investigations so thorough, as rarely to leave questions of that kind open to litigation. Under the clause that the "assured has no disorder tending to shorten life," some curious questions have occasionally been presented, as in *Watson v. Mainwaring*, 4 *Taunt.* 763, where the point arose whether dyspepsia was a disease tending to shorten life. And the court held that it was not, "that all disorders have, more or less, a tendency to shorten life, even the most trifling; that if dyspepsia was a disorder that tended to shorten life, within this exception, the lives of half the members of the profession of the law, would be uninsurable."

§ 619. Life policies are now carefully guarded by condi-

tions which require a strict observance to prevent their forfeiture. They frequently contain a condition, that the policy shall be void if the insured shall die upon the high seas or the great lakes; or shall pass beyond the settled limits of the United States, and of the British provinces; or, if he live in the Northern States, south of the States of Virginia and Kentucky. And also if he enter in the military or naval service, or if he die by suicide or in a duel, or by the hands of justice. The question whether death by suicide, when the result of insanity, is such a violation of the condition as to defeat the policy, has arisen and been differently decided by the English and American Courts. In the former, in *Clift v. Schwable*, 3 *Manning, Granger & Scott*, 437, the broad ground was taken that the terms of the condition included all acts of voluntary self-destruction, and that whether he was, or was not, a responsible moral agent, was immaterial. In *Breasted v. The Farmers' Loan and Trust Company*, reported first in 4 *Hill*, '73, and affirmed in 4 *Seld.* 299, it was held that if the insured died of suicide, while insane, the case is not within the exception.

§ 620. It has never been doubted but that policies of life insurance were assignable. There is no statute restraining it in this country, and nothing tending to qualify it unless the statute against gaming and wagering has that effect. But the doctrine is now clearly settled by the case of *Ashley v. Ashley*, 3 *Simons*, 149, in England, and *St. John v. The American Mutual Life Insurance Company*, 3 *Kern.* 31, in this country. A policy valid in its inception is a chose in action, and governed by the same principles applicable to other agreements involving pecuniary obligations. Whatever may be the consideration of the assignment, the assignee is entitled to recover against the insurers the whole face of the policy. Nor is it essential that the assignee should have an insurable interest in the life of the insured to entitle him to recover. It is sufficient if he proves a valid assignment of a policy legal in its inception.

§ 621. Another question which may be considered as involved in the last as broadly decided in the case referred to, relates to the point whether a life policy embraces a contract merely of indemnity, or one which is to be executed according to its terms. The English courts at first regarded it in the light of an indemnity only, and in *Godsall v. Boldero*, 9 *East*. 72, held that where a creditor insured the life of his debtor, he obtained only an indemnity against the loss of his debt, and that its payment by the debtor barred all recovery upon the policy. But that doctrine has since been reversed in *Dalby v. The India and London Life Assurance Company*, 15 *Common Bench Rep.* 365, also in 80 *Engl. Com. Law Rep.* 364, in which it was denied that the contract of life insurance was one of indemnity, holding that where a party had an interest in the life insured at the time the policy was effected, the fact of his interest ceasing in such life, before the death, did not invalidate the policy. The same principle affirmed in this country in *St. John v. The American Mutual Life Insurance Company*, 3 *Kern*. 31.

§ 622. The commencement of the risk dates from the unconditional acceptance of the proposition to insure, and hence where the insurers by letter had made known the terms upon which they would insure, and the insured had in reply mailed a letter properly directed, containing an acceptance of the proposition, together with the premium, it was held to constitute a sufficient contract of insurance. *Taylor v. The Merchant's Fire Insurance Company*, 7 *How. U. S. Rep.* 390. The loss must occur within the period of insurance, and hence it was said by Willes J., in *Lockyer v. Offley*, 1 *T. R.* 260, that if the party receives a mortal wound within the period, and dies after it has expired, the insurer is discharged. The risk incurred is the termination of the life insured, and this is to be shown by the party averring it. The time of its occurrence is a fact to be found by the jury. It must sometimes necessarily rest upon presumption, and the general rule here is, that any one who has not been

heard of for the space of seven years, may, for all legal and equitable purposes, be presumed to be dead. *Tilly v. Tilly*, 2 *Bland*, 445. Questions of great difficulty and embarrassment have sometimes grown out of the necessity of determining who was the survivor, where two or more have perished by a common accident, as a shipwreck ; and in their settlement the civil law and the Code Napoleon have adopted presumptions derived from physiological principles, such as the relative ages, health, and physical condition of the parties, as affording indications of the amount of endurance each could suffer before dying, and hence the relative length of time each would be able to hold out. The common law has rejected these refined distinctions, and adopted the principle, that where two or more have perished by a common disaster, and there is no evidence as to which survived, the other, they shall be presumed to have died together ; but if there is evidence tending to show which died first, that will control, and in case of great inequality in age, health, and physical condition, it may be given in evidence, and aid in the conclusion.

§ 623. Where a policy provides for yearly payment of premiums, there is generally a condition annexed, that in case of the non-payment of the premium at the specified time, or within a certain number of days thereafter, the policy shall cease and be void. In such a case a neglect to pay at the time specified would result in the termination of the contract of insurance. But a policy forfeited by non-compliance of the assured with its precise terms, may be revived by an unconditional acceptance on the part of the insurers of their premiums. *Wing v. Harvey*, 27 *Eng. L. and Eq.* 140.

#### QUESTIONS.

What is life insurance ? What may the engagement be ? What may the consideration be ? What are the objects sought by the insurance ? What does the law require to render legal the insurance ? Has any one a right to insure his own life ? What may a creditor insure, and why,



and to what extent? What is often done at the time of the creation of the debt? What instances in which the life of others cannot be insured? What kind of interest must it be to justify insurance? When can a child insure its father's life? When a single woman that of her brother? When, how, and under what, a married woman that of her husband? And what, and in exclusion of whom, entitled to on his death? What is the policy issued upon the strength of? What the questions to which answers are the most commonly required? What the result, if the statements made are incorporated into the policy or made a part of it? What if not incorporated? If representations, how must they be made to avoid the policy? When will they avoid it if immaterial and fraudulently made? What is the rule where there is no warranty, representation, or fraud? What should the insurer do to obtain knowledge? What the duty of the assured as to relevant questions? How must the answer be? Under what circumstances may a policy be rendered void where no specific questions are asked? Where there is no warranty or condition, what risks does the insurer take? In regard to what does the insurer generally rely upon the insured? What does the insured's application bind him to disclose? Who takes the risk of a fact being immaterial? Who decides on the materiality of facts? When has the insured done all the law requires of him? What if he chooses to speculate? What instances in illustration? Is dyspepsia a disease tending to shorten life? What conditions are now frequently contained in policies? If suicide results from insanity, is it a violation of the condition? Are life policies assignable? How are they now regarded? What the assignee entitled to recover? Must he have an insurable interest? Is a life policy a contract of indemnity or one to be executed according to its terms? What instances in illustration? When does risk commence? When terminate? By whom latter to be shown? What a question for? When presumed dead? What rule as to presumption of survivorship? How may policy be forfeited, and how forfeiture waived?



## CHAPTER IV.

### CONTRACT OF TRANSFER OF PROPERTY.

#### FIRST.—BY SALE.

§ 624. A sale, or an exchange, is a transfer of title in the thing sold or exchanged to another, in consideration of some price or recompense received from the purchaser. This will

sufficiently define the contract of sale, although not all the possible modes by which title can be transferred from one to another. One mode is by operation of law; as, where personal property is wrongfully converted by one to his own use, and the owner brings an action against him, and recovers judgment for its value. Either the perfecting of the judgment, or the satisfaction of the execution issued thereon, (and which of the two is still an open question,) operates a transfer of title in the property converted to the judgment or execution debtor. With the view of including this and all other possible modes of transferring title in property for a consideration, sale has been defined to be "a transmutation of property from one man to another in consideration of a *money* price." Barter is the exchanging of one commodity for another. It is older than sale, prevailing in the infancy of society. The general principles that regulate both are essentially the same.

#### PART I.

##### THING TO BE SOLD.

§ 625. Parties competent to contract are necessary here as in all other kinds of contracts. A new element is here introduced, viz., the thing which is the subject of sale. This is essential to this species of contract, as the essence of it is found in the transfer of title. The thing sold must have either an actual or a potential existence, at the time of the sale. It may be in the hands of an agent, or in the course of consignment on its way to the consignee, and a sale will be valid; but if one sells to another a piece of property, both parties believing it to be in existence at the time, and it turns out that they were mutually mistaken, the article having been previously destroyed, no contract of sale can arise. A horse is sold which both parties believe to be alive, but which was in fact dead; the contract is void.

§ 626. Although there is no difficulty where the thing sought to be sold is totally destroyed, or never had an existence; yet much contrariety of opinion has grown out of a partial destruction, or non-existence of the thing sold, in its effect upon the sale. An executory agreement is entered into for the sale of an estate consisting of several lots of land, and the title to a part of them fails. What are the rights and duties of the purchaser? Can he abandon the purchase, or be compelled to perfect it? The cases of *Offley v. Shallcross*, 4 *Madd. Chan. Rep.* 227, and *Judson v. Wass*, 11 *John.* 525, hold that in such case the purchaser may abandon his purchase; but a very judicious modification is laid down by Lord Brougham in *Casamajor v. Strode*, 1 *Cooper's Sel. Ca.* 510, to the effect that the purchaser, in such case, was not to be let off from his contract for one lot, on the ground that the title to the other was bad, unless it appeared from the circumstances that the two lots were so connected that the purchaser would not have bought, except in the expectation of possessing both lots. Where a purchase has been perfected and no fraud has entered into the transaction, the purchaser being in possession, he cannot set up a partial failure of title as a defence against securities for the purchase money, as he may resort to his remedy at law on his covenants of warranty. But where there is a total failure of title, and no possession given upon the sale, or where, after the giving of possession, there occurs an eviction, the purchaser has an undoubted right, in the absence of all fraud, to rescind the purchase. This comes under the principle first laid down. There has been in reality nothing sold, and no rights of any possible value transferred to the purchaser. But the case is varied where possession is given and maintained; and hence in sales of chattels, in cases free from fraud, the purchaser cannot resist payment while the contract continues open, and he retains possession. In the jurisprudence of New York the damages sustained on a partial failure of title to that which

the vendor has sold under a warranty, may be set up by way of recoupment by the purchaser, to an action brought to recover the price. But the question still remains as to the purchaser's right where the main inducement to the purchase has failed ; and here the rule laid down by Chancellor Kent, in 2 *Kent's Comm.* 476, as collected from Pothier, Lord Erskine, and Lord Kenyon, is undoubtedly the correct one, viz. : " If the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether."

§ 627. Another question that has been differently decided by the courts, relates to the legality of the sale when the thing sold is not at the time owned by the vendor, although it may be in existence, and the property of another. Lord Tenterden held in *Bryan v. Lewis, Ryan & Moody*, 386, that if goods be sold deliverable at a future day, and the vendor neither has the goods nor any contract for them, nor any reasonable expectation of receiving them by consignment, but intends to go into the market and buy them, it was no valid contract, being merely a wager on the price of the commodity. This doctrine, however, was completely overruled in *Hibblewhite v. McMorine*, 5 *Mee. & Wels.* 462. A statute was formerly in force in the State of New York, to prevent stock-jobbing, which affirmed the doctrine of *Bryan v. Lewis*, but that has since been repealed, so that the contrary doctrine now prevails.

§ 628. The subject of sale need not have an actual existence. It is sufficient if it exist potentially. It is competent to sell the expected produce of that which has an actual existence. The grain expected to grow on a field owned by the vendor, the milk that a cow may yield during the coming year, the future young of sheep owned by the vendor, or the future wool that may grow upon them, are all subjects of sale. Even an expectation founded upon mere chance, as

the product of a net to be cast by fishermen, may be the subject of sale. But a mere possibility or contingency, depending upon nothing in actual existence, cannot be sold. Instances of this would be, the future wool of sheep which the vendor did not own, the mere expectancy of succeeding to an estate; although if such expectancy is founded upon a right, as where a reversionary interest is founded on a settlement or entailment, it may be the subject of sale.

### QUESTIONS.

What is a sale or exchange? Is there any mode of transferring title by operation of law? Under what circumstances may this be done? How, in reference to this, may a sale be defined? What is barter? Which is the older, sale or exchange? Any difference in the general principles applying to each? What new element is introduced into the contract of sale? What is the essence of this contract found in? What kind of existence must the thing sold have? How if in the hands of an agent, or in the course of consignment? How if article sold be at the time destroyed? What is the rule where several lots are purchased, and the title to some of them fails? What is a purchaser in possession precluded from doing when action is brought against him for purchase money? How, where there is total failure of title and no possession? How, in case of purchase of personal chattels when he remains in possession? What is the remedy in New York under recoupment? What the rule where main inducement to purchase has failed in consequence of defect in title? Suppose the thing sold in existence, and not at the time owned by the vendor, can he give title by a sale? Has there been any conflict and what, in the rule on this subject? What, besides an actual existence of the thing sold will enable an owner to sell? What can he sell the expected produce of? What cases put in illustration? Can a mere possibility be sold? Can an expectation founded upon chance? When is a reversionary interest the subject of sale?

### PART II.

#### THE PRICE OR EQUIVALENT.

§ 629. The price is the equivalent rendered by the purchaser for the thing sold. It is essential to constitute a contract of sale, as without it the transfer would be a mere gift. In a *sale*, as contradistinguished from *exchange*, it

must be money, and a certain definite sum, or susceptible of calculation. The rule is, that the contract should either name the price, or the means by which it may be arrived at, or leave open the means of ascertainment. If specified in the contract, that, in the absence of fraud or mistake, is binding upon the parties. The contract may provide express means, as that a third person, naming him, shall affix the price, adopting in advance whatever sum he may name. In such case the contract remains incomplete until the price is affixed according to its terms, and if such third person dies, or refuses to act, all binding obligation ceases. The only means provided for ascertaining an essential element have utterly failed, and the contract itself must necessarily terminate. So also the parties may provide that the price shall be the same as that charged by others for a similar article, or that it shall be its fair market value, or what it is reasonably worth; or there may be no provision in reference to it, and then, if the sale be perfected by delivery, it will be construed as being what the article is worth in the market, the sum in all these cases to be ascertained by a jury.

§ 630. The common law allows parties to make their own contracts, and affix their own prices to articles sold. It will enforce the contract, if legal, however inadequate the price, provided every part of the agreement is entered into in good faith, and in the absence of all fraud or mistake. If the price agreed upon be far below the market value, it may be claimed as a badge of fraud, and with the aid of other circumstances may make out a sufficient defence. It may, if grossly inadequate, constitute a sufficient reason why a court of equity will refuse to decree a specific performance of a contract. It must be a sum agreed upon as the actual price or equivalent for the thing sold, and must not be a real loan of money under the name of a sale.

§ 631. The effect of a contract of sale perfected, is to transfer the title to the goods to the vendee and the price to the vendor. If the price is not immediately paid, a debt is

created, the vendor standing in the relation of creditor and the vendee as debtor. If no such debt is created on the sale by the giving of credit, the vendee or purchaser, cannot entitle himself to the goods without paying or tendering the full price. But if a credit forms a part of the contract, the vendee may immediately demand possession of the goods. By the terms of a sale, the price is to be paid in the notes of a third person, whom both parties suppose to be solvent. Before the notes are executed he becomes insolvent. Can the vendee, on tendering the notes, entitle himself to the goods? He cannot. *Benedict v. Field*, 16 *New York Rep.* 595.

§ 632. The rights and remedies of the parties depend much upon whether the contract be *entire* or *severable*. *Oneness* or *separateness* of price is the usual test of an entire or severable contract of sale. If a single sum is agreed upon as one price for several commodities, it is obvious the contract furnishes no means of apportioning that sum among the different commodities. This makes it an entire contract, and renders it necessary that one party should perform, or offer to perform, all his part of it, before he can call upon the other. The sale either of one certain thing, or of several certain things for one certain price, constitutes an entire contract. In one that is *severable* the consideration, by the terms employed, may be apportioned in such a manner as to conform to the unascertained consideration on the other side. A party agrees to buy as much grain as corresponds to a sample, at a certain price per bushel. Here is no entire quantity, and no entire price, but only a certain relation between the two; and that relation furnishes the means of ascertaining one side when the other is completed.

§ 633. There is a species of severable contract differing from that last mentioned. That was indefinite, undetermined on both sides until the completion of one, and that furnished the means of completing the other. In this species, one side is definite, limited, a certain number or quan-

tity of things being on one side, and made the subject of sale or purchase, the price being fixed either by a certain rate agreed upon, or by the single article or measure, or by a particular valuation to each thing, if the things be of different kinds. A certain farm, and dead stock, and growing wheat are all sold together in one contract, but a separate price is affixed to each. This contract is only entire as to each item. The whole contract is in fact severable into three contracts, and a failure to comply in one particular does not invalidate the sale or give the vendee a right to reject the whole contract. *Mayfield v. Wadsley*, 3 *Barn. & Cress*. 357. In this manner it is competent for the parties, by agreement with each other, so to apportion the consideration to the subject-matters of the sale, as to transform what would otherwise be an entire contract into a severable one, and the consent, so to transform, will be implied in all cases where an act is done which is inconsistent with the recognition of the entirety of the contract. A orders three parcels of goods for a certain price. He may refuse to accept of one without the others. But if one of them be sent and he accept it, he cannot refuse the second merely because the third is not sent; since by his acceptance of one, he has consented to treat the contract as several for each of the parcels. *Champion v. Short*, 1 *Camp*. 53.

§ 634. Either the price, or the thing to be sold, one or both, may be thrown into the future, and thus be made executory upon one or both sides. A merchant contracts to sell all the goods of a particular description which his foreign agent may ship in a certain vessel, or within a certain time. This is an executory contract of sale. *Boyd v. Skiffkin*, 2 *Camp*. 326.

§ 635. Another kind of executory contract of sale, or rather an agreement to make a sale, occurs when the article purchased has no existence at the time of the contract, but is yet to be manufactured by the vendor. This strictly is not a contract of sale, as no title passes to the purchaser



until the completion of the thing, and its actual delivery or appropriation by the purchaser, or its being set apart for, and accepted by him. It follows as a consequence of this, that the vendor, or manufacturer, is under no obligation to deliver the article originally intended, but if he chooses he may dispose of that, and furnish another that will comply with his contract. The agreement sometimes provides that the work shall be done in successive stages, and that the price shall be apportioned to each stage, and be paid as each becomes completed. A contracts to build for B, a vessel of certain specified dimensions, and deliver it to him complete by a certain day for the price of \$5,000. Of this sum \$3,000 is to be paid at different stages of the work, and \$2,000, when it is completed and delivered. B's agent is to inspect and approve as the work progresses. The important question here is, whether the title to the different parts of the vessel, as they are successively completed and paid for, passes to, and vests in, the purchaser, so that in case of destruction, the loss would be his; or is there no transfer and vesting of title until the completion and delivery of the entire vessel? The former is the doctrine settled in the English law. *Clark v. Spencer*, 4 *Adol. & Ellis*. 448. The latter is that prevailing at present in this country. *Andrew v. Durant*, 1 *Kern.* 35. Also same case, 18 *New York Rep.* 496.

§ 636. If the goods which are the subject of sale are, at the time, existing, the vendee, by advancing the price, may procure an immediate transfer of the title to himself, and thus become entitled to recover them of the vendor, or of any other person who may have come into possession of them. But the goods will remain at the risk and hazard of the vendor, so long as any thing remains to be done by him which is either required by the contract, or by the custom of trade.

§ 637. There are also conditional sales, in which the fact of sale, or the payment of the price, is made dependent

upon a condition. The difficult question to determine here is, whether the title has passed so as to vest in the vendee or not. If the condition be precedent, no title passes until its performance. An agreement is made to sell 150 tons of pig-iron, of a certain quality, "on board the ship L," which was then at sea. This was held to be conditioned upon the iron's arrival in port, and no sale until its arrival. *Shilds v. Pettie*, 4 Comst. 122. Sales are not unfrequently made *on trial*, and when any particular time is specified within which the trial is to be had, the article must be returned within that time, or the contract becomes binding. But the party taking on trial is entitled to the whole of the time specified to make up his mind ; and within that period he may change it as many times as he pleases, and even communicate such changes to the other party, without in the least impairing his right to come to such ultimate conclusion as he may, under all the circumstances, elect. He must not, however, return the goods, or allow the matters in negotiation to be closed.

§ 638. It is competent to imply conditions from the circumstances of the case, where none are expressly attached. Certain rules of which the vendee has notice are posted up at the place where goods are sold, stating the conditions of sale. These will be implied in every sale made there, although no express reference be made to them in the contract of sale. *Bywater v. Richardson*, 3 Nev. & Man. 748.

§ 639. If the vendor doubts the ability of the vendee to pay the stipulated price, the contract of sale may be conditioned upon such payment. The goods may be delivered to the purchaser, and the right he acquires is that of using them until the time of payment arrives, and then if he makes default in that, his right ceases. Such a conditional purchaser acquires no right which can be the subject of levy and sale under an execution against him. *Herring v. Hop-pack*, 15 New York Rep. 409.

§ 640. The parties may, if they choose, waive all condi-

tions that are attached to a sale. Goods are sold conditioned to be paid for on delivery by notes, and the goods are delivered without the notes being given or demanded. A presumption arises that the condition is waived, and a complete title, therefore, vests in the purchaser. But this rests entirely in presumption. It is only *prima facie*, and it is competent to introduce rebutting proof of the acts and declarations of the parties at the time, and which go to show a different intention. Where the delivery is complete, the establishment of the condition rests upon the vendor, and in such case, whether conditional or not as between the parties, a *bona fide* purchaser from the vendee will get a good title. *Smith v. Lynes*, 1 *Seld.* 41.

#### QUESTIONS.

What is price? To what is it essential, and why? What is it in case of sale? What must the contract do in relation to price? What effect of specifying it in the contract? How may contract provide for price in the future? What will create a failure and annul the contract? What if no provision be made in reference to the price? Suppose the price is inadequate, what is the rule? What may it be claimed to establish? If grossly inadequate, what is the rule in equity? What the rule as to its being actual? What is the effect of a contract of sale perfected? What if the price is not immediately paid? If debt be created, what must purchaser do to entitle himself to goods? What if credit form a part of the contract? What if notes of a third person are to be given, and the maker becomes insolvent, can vendee, by tendering notes, entitle himself to the goods? What is the test of entire or severable contract of sale? What constitutes an entire contract? What one that is severable? What illustration? What other species of severable contract is there? What illustration? What may parties do in case of entire contract? What implication may arise, and from what? What illustration? When may a contract of sale be rendered executory? And how may it be done? What illustration? What is another species of executory sale, or agreement to make a sale? Does any title pass by such agreement? Must the manufacturer furnish the article originally intended? Suppose work is to be done in successive stages, as payments are made, what effect has this in transferring title? What illustration? What the difference between the English and American rule? How may purchaser procure an immediate transfer of the title to himself? How

long will goods remain at risk and hazard of vendor? When are sales conditional? What is the difficult question here? What if condition be precedent? What illustration? What the rule when sales are made on trial? When must article be returned? How long may vendee take to determine? May conditions ever be implied? What illustration? What if sale be conditioned upon payment? What right does purchaser then acquire? Can there be waiver of condition? What illustration? Can presumption be rebutted? How? How is it where delivery is complete? How in such case is it with *bona fide* purchaser from vendee?

### PART III.

#### THE ASSENT TO THE CONTRACT.

§ 641. This contract, like every other, requires the assent of both parties to be freely and intelligently given. The proposition may proceed from either one, and be withdrawn at any time before its acceptance. Thus a proposition is made by A to B to exchange horses with him, and to give him a specific sum as the difference. B had the privilege of reserving his determination until a certain day. Before the arrival of that day, A gives notice that he revokes his proposition. The contract of exchange of horses is at an end. *Eskridge v. Glover*, 5 *Stew. & Port.* 264. The acceptance of a proposition may always be implied, where, by the terms of the offer it is incumbent on the other party to express his dissent, or where his acts afford an unequivocal presumption of assent.

§ 642. A compliance with a proposition made has the same effect as an acceptance. An order for certain descriptions of merchandise is sent by one merchant to another. The one to whom it is sent, instead of formally accepting the proposition, complies with it, and sends the goods agreeable to the order. If these latter are forwarded before any telegraphic dispatch countermanding the order, or any retraction of it is received, the contract must be considered as completed, and the goods are the property of the party who orders them. So also if forwarded after the retraction is

written, but before the receipt of it, the result is still the same. To annul the contract, or rather to prevent the forming of one, the notice of revocation of the order must be brought home to the party upon whom it is made, before there is any compliance with it by forwarding the goods. If the proposition is accompanied by any conditions or limitations, the acceptance, or compliance, must correspond precisely to it, for any variation will have the effect of a new proposition, which will itself require acceptance by the other party.

§ 643. The rule is inflexible at common law which requires the assent of the owner of property either express or implied, to legalize any disposition that may be made of it. His right, title, and interest in the property he owns, can never be divested, except by his own assent, fully and freely given, or by due process of law to which his assent is impliedly given. This principle in our jurisprudence is now very fully settled. In England there are markets overt, which are held in certain places on certain days of the week, at which the sale and delivery of property will transfer a good title. The owner of lost goods, if he desires to protect himself, must resort there and give notice of his ownership, forbidding the sale, or he is bound by it. In this country there are no markets overt, and hence no opportunity afforded the owner to assert his claim. The law will not here allow any property to be acquired by another in goods or chattels without the assent of the owner. Several cases of great hardship have occurred, in which property has been disposed of to *bona fide* purchasers for its full value, who have nevertheless been held responsible to the true owner. The sale of stolen goods by the thief, or any one deriving title through him, can, in this country, in no case, be valid. Even a *bona fide* purchaser of such goods, who subsequently, without any notice that they are stolen, sells them as his own, is liable to the owner, in an action of trover, for their full value. His purchase and sale of them is considered a

conversion. Goods are stolen from the plaintiff in New York, forwarded to Baltimore, and there sold at auction. The proceeds, without notice, had been paid over to the thief in the ordinary course of business. And yet the auctioneers were held liable to the owner for the value of the goods. *Hoffman v. Carow*, 22 *Wend.* 285. So, also, where goods were shipped at New Orleans under a bill of lading to deliver to consignees at New York; and at Norfolk, where the vessel had arrived in distress, a part of the goods were sold, and the rest shipped on another vessel, a bill of lading being taken for their delivery to the master's order in New York, by which means they were delivered not to the original consignees, but to another mercantile house, from whom the defendants purchased them in good faith, at their full value, without notice; and yet, although they purchased them for a fair price, in the usual course of trade, from persons holding a bill of lading indorsed to them, (the usual evidence of such property,) and who were in actual possession of the goods, they were nevertheless held responsible to the New Orleans owners for their value. *Saltus v. Everett*, 20 *Wend.* 267.

This principle of protection has its limitation. It does not embrace

1. Negotiable paper taken *bona fide*, for a valuable consideration, and before due.

2. Sales made by agents, who have been held out by the principal as having authority to sell, and by that means have been enabled to deceive the vendee.

3. Judicial sales, to which many of the rules applicable to market overts have an application, and,

4. Where the owner has been, through the practice of fraud, induced to assent to a sale, and the fraudulent vendee, before any movement on the part of the vendor to avoid the sale, has transferred them to a *bona fide* purchaser for value, without notice.

§ 644. The assent can never be sufficiently perfect to re-

sult in a contract, where the parties are laboring under a *mistake* in relation to any material point connected with the sale. It must be a mistake of fact, and not of law, as every citizen is bound to know the latter. *Clarke v. Dutcher*, 9 Cow. 674. This doctrine is not universally acquiesced in. A different rule is established in Connecticut, where money paid under a *mistake of fact or law* is allowed to be recovered back where there was no legal or moral obligation to pay. *Northup v. Graves*, 19 Conn. 548. The same doctrine has also been established in Kentucky. *Ray v. Bank of Kentucky*, 3 B. Monroe, 510. The contrary prevails in New Hampshire, *Petersborough v. Lancaster*, 14 N. Hamp. 382. The general conclusion that has been arrived at, however, is, "that the contracts and acts of competent parties, when free from fraud of every kind, and made or done with full knowledge of all the facts, ought not to be disturbed on the allegation of ignorance of the law." Where a party voluntarily chooses to remain in ignorance when opportunities of information are afforded him, his ignorance will not avail him; but he is held responsible for the knowledge which his neglected opportunities would have afforded him. If, however, money has been paid under a *bona fide* forgetfulness of facts, which disentitled the defendant to receive it, it may be recovered back. *Kelly v. Solair*, 9 Mees. & Welsb. 54. A distinction has also been taken between *ignorance* and *mistake* of the law; allowing a party who has contracted under a clear mistake of his legal rights, especially where such rights were of a doubtful character, to be relieved in equity, but denying all such relief in case of ignorance of the law. *Lawrence v. Beaubein*, 2 Bailey's S. C. Rep. 623.

§ 645. Another element which may, on the application of the party defrauded, render void all contracts into which it enters, is that of fraud. The party who is cheated into the giving of his assent has, as between himself and the other party, a right at any time to withdraw it, and thus

avoid the contract. Fraud has been classified by a learned judge into four classes.

1. That which is actual, arising from facts and circumstances of imposition.

2. It may be apparent from the intrinsic value and subject of the bargain itself—such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept on the other.

3. It may be inferred from the circumstances and condition of the parties ; for it is as much against conscience to take advantage of a man's weakness, or necessity, as his ignorance.

4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons. *Lord Hardwick in Chesterfield v. Janson*, 2 Vesey Sr. 125, 155.

§ 646. What concerns business men more especially to understand, regards the duty of making to each other mutual disclosures of certain facts. The facts in relation to which this obligation exists must be material, and not open and naked, and such as are apparent to observation. One remaining qualification is necessary to render the obligation perfect, and that is, that the party to communicate possess the knowledge that the other is ignorant of them. The moral law requires the vendor to disclose all defects within his knowledge. The common law adopts this principle with some modifications. It does not require a disclosure of such defects as are equally open to the observation of both parties. But in regard even to these, the vendor must neither say nor do any thing that will divert attention, or render less perfect the observation of the vendee. It permits each party to avail himself of the benefit of his own superior knowledge, provided the means of obtaining it are equally open to each, and one exercises no wrongful influence upon the other in diverting or diminishing the amount of observation which he would otherwise expend. By the English rule, if the representation be false to the knowledge of the



party making it, it will be conclusive evidence of fraud, but if made honestly, and believed to be true by such party, although not true in fact, yet it does not amount to fraud, or create a cause of action. The rule in this country is different, as in *Smith v. Richards*, 13 *Peters*, 26, it was held, that a party selling property must be presumed to know whether the representation he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind ; but if he does not know it, then it can only be from gross negligence ; and in contemplation of a court of equity, representations founded on a mistake resulting from such negligence is fraud. The rule, however, is more rigid in equity than at law. A grantor having falsely affirmed that a farm had been valued by two persons, at a certain price, and this having induced a purchaser to contract for it ; the misrepresentation was deemed sufficient by Lord Hardwick to withhold a decree for specific performance. *Buxton v. Lister*, 3 *Atk.* 386.

§ 647. It is extremely difficult to fix a limit, or decide in what cases a party having superior knowledge, is bound to communicate to the other. Thus in the case put by Lord Thurlow in *Fox v. MacKreth*, 2 *Brown*, 420, he held that a party negotiating for the purchase of an estate, was not bound to disclose to the owner his knowledge of the existence of a mine on the land, of which he knew him to be ignorant, on the ground that there was no fraud in the case, and that nice rules of honor could not be incorporated into the law. But here the Court of Chancery was asked to set aside a sale. When its aid is invoked to carry a contract into execution by the enforcement of its specific performance, it will then yield its homage to higher principles of ethics, and refuse to enforce a contract where, in its formation, there had been such a reservation of superior knowledge. *Parker v. Grant*, 1 *John. Chan. Rep.* 630.

## QUESTIONS.

What is required in this contract as to assent? What illustration? When is the acceptance of a proposition implied? What illustration? What is required to prevent the forming of a contract? What if proposition be accompanied by any conditions or limitations? What is required at common law to legalize any disposition that may be made of property? What are there in England which furnish means of giving good title to property sold? Are any such here? Can stolen goods be sold here except by owner so as to give a good title? Suppose *bona fide* purchaser, without notice, subsequently sells them, can he be made liable? What illustrations? What are the instances not embraced within this principle of protection? What effect on a contract of sale has laboring under a mistake? What must it be a mistake of? Is this doctrine universally acquiesced in? What is the general conclusion? What the rule where a party voluntarily chooses to remain in ignorance? What is the effect of forgetfulness of the law? Any distinction, and what, between ignorance and mistake of the law? What is the effect of fraud upon the contract of sale? Who may set it up? Into how many classes may fraud be classified? What are they? What kind of facts require mutual disclosures to be made? What must be the character of such facts? What does the moral law require? What the common law? What does it permit to each party? What does the English rule require? What is the rule in this country? When does a court of equity require superior knowledge by one party to be communicated to the other in order to the granting of relief, and when will it refuse relief although not communicated?

## PART IV.

## CERTAIN THINGS ESSENTIAL TO THE COMPLETION OF THE CONTRACT.

§ 648. Under this part come up two things for consideration.

1. The *statute of frauds*, as affecting the contract of sale, and,
2. The *delivery* necessary to complete the contract.

As to the first, the legislation in this country has copied after the English statute, the influence of which has pervaded our whole system of jurisprudence. That requires in order

to the completion of a contract of sale, that the purchaser should either

1. Accept part of the goods, and actually receive the same ; or,
2. Give something in earnest or in part payment ; in the New York statute something in part payment ; or,
3. That some note or memorandum, in writing, of the bargain be made, and signed, or subscribed by the parties to be charged.

§ 649. The first question that arises here relates to the kind of contract that comes within the statute. It embraces all contracts in which there is nothing wanting for completion but the transfer of the commodity and price ; and all those which are executory, where the articles sold are, at the time of the sale, existing in the same shape in which they are to be delivered. But it has no application to any executory contract for the future manufacture and delivery of goods, or the changing their condition by work and labor to be expended upon them. A contract is made for the sale of a boat load of wheat, to be delivered at a subsequent day. It is within the statute, and not binding, except by a compliance with the statute. But a contract to deliver wheat at a future day, the same being at the time unthreshed, is not within the statute, and valid, without such compliance. *Jackson v. Covert*, 5 *Wend.* 139. This doctrine is based essentially upon an older case, viz., that of *Clayton v. Andrews*, 4 *Burr.* 2101 ; but the doctrine in the extent to which those cases carry it is very much shaken by the recent case of *Garbutt v. Watson*, 5 *Barn. & Ald.* 613, holding that where sacks of flour were not prepared when they were sold, but were to be got ready for delivery in a few weeks, and although the flour was not ground at the time, yet it was still a contract for the sale of goods, and was within the statute. So that the doctrine may now probably be stated to be, that if the article sold had an actual existence at the time, and was capable of delivery, the contract is within

the statute of frauds ; but if it is to be afterwards manufactured, or prepared by work and labor for delivery, then the contract is not within the statute.

§ 650. The delivery required to satisfy the statute has some peculiarities. Although it be only of a part of the goods sold, yet it must be with an intention of vesting the right of possession of the whole in the vendee ; and the latter must actually accept the same with an intention of taking possession as owner. The acceptance must be unequivocal, final, and complete, on the part of the vendee or his agent. The carrier, unless the authorized agent of the vendee, cannot make such an acceptance. The vendor's order on the warehouseman having the custody of the goods is insufficient, unless the warehouseman accept the order, and agree to hold the goods on account of the vendee. The acts of the parties may imply such a final and unequivocal appropriation of the article, as to be a sufficient compliance with the statute. Thus where, after some negotiation between a livery stable keeper and a horse dealer, and a proposed purchaser, a bargain was struck, and the latter requested the former to *keep them at livery for him*, upon which *they were removed out of the sale stable into another stable*, this was held to be a sufficient delivery under the statute. *Elmore v. Stone*, 1 *Taunt.* 458. This case has been justly censured as carrying the doctrine of constructive delivery to the utmost verge of safety. A stricter doctrine has been generally adhered to, and that case could now be hardly deemed as furnishing a safe precedent to follow. But if acts are solely relied upon, they must be unequivocal in their character, and if the vendor still retains possession, it must be under circumstances showing that he retains it not in his own right, but only as agent or bailee of the vendee. Thus where a horse was verbally sold, but was to remain with the vendor twenty days without charge, and at the expiration of that time was sent to grass as one of the vendor's horses ; it was held that there was here no sufficient delivery and

acceptance. *Carter v. Touissant*, 5 *Barn. & Ald.* 855. In the case of a column of granite of such weight and magnitude, as not to be susceptible of any other delivery, the Roman law allowed possession to be taken by the eyes and the declared intention ; but our law requires some act of acceptance to satisfy the statute, and holds that a mere naked agreement, though the property was designated by the parties at the time, to be not a sufficient delivery and acceptance. *Shindler v. Houston*, 1 *Comst.* 261. Where there is an entire contract, and nothing remains for the vendor to do, a delivery of a part is a sufficient delivery of the whole within the statute ; as where goods were purchased at auction in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, it was held that the whole constitutes but one contract, and the delivery of some of the parcels is sufficient to take the case as to the residue out of the operation of the statute. *Mills v. Hunt*, 20 *Wend.* 431.

§ 651. The delivery and acceptance, in order to comply with the statute, must, it is said, be so perfect and complete as to negative four things, viz. :

1. The vendor's right of lien.
2. The vendor's right of stoppage *in transitu*.
3. The right of either party to cancel the contract.

4. The right of the vendee to reject the articles on the score of deficiency either in quantity or quality. This has long been received as undoubted law, and acquiesced in as such, but in a recent case in England, *Morton v. Tippet*, 15 *Q. B.* 428, Lord Chief Justice Campbell wholly dissents from the doctrine contained in the two last propositions, and holds that an acceptance may be sufficient to satisfy the statute, although the purchaser has a right to object to the quantity or quality of the article, and to repudiate the sale. It is obvious that there can be no actual receipt while the goods are subject to the vendor's lien or right of stoppage *in transitu*, and hence that merely marking and setting aside the goods sold, at the vendee's request, and with a view to

their appropriation by him, is an insufficient delivery under the statute. And in case of the delivery of a sample of the goods sold, there is no sufficient compliance with the statute unless the sample is considered by both parties as a part of the commodity itself, and hence as diminishing by so much, the bulk thereof to be finally delivered.

§ 652. As regards the written memorandum required by the statute, it must contain a distinct and clear statement of the terms of the agreement, together with the names of the parties. The terms need not be all upon the same paper. They may be collected from the correspondence of the parties, or from any two papers referring to each other, or to the same contract. An auctioneer or broker is the agent of both parties sufficient to bind them by the memorandum, and under the wording of the statute of this State, it must be *subscribed*, or the signature must be placed at the end of it, although it is sufficient if it be done by the party to be charged. *Davis v. Shields*, 24 *Wend.* 322, and reversed in 26 *Wend.* 341.

§ 653. Delivery may be of three different kinds: that which will satisfy the statute, that which will destroy the lien of the vendor, and that which will pass the title to the thing sold. The general rule here is, that no title can pass to the vendee so long as any thing yet remains to be done between the vendor and the vendee, in relation to the goods, and which is necessary to give the latter a perfect control over them. This usually applies to marking, weighing, and numbering them, so that they may be separated, distinguished, and identified from every other. Thus where goods were sold while lying at a warehouse, at such a price per hundred weight, but the exact weight not being known, was afterwards to be ascertained. Held, no property passed to the vendee. *Hanson v. Meyer*, 6 *East.* 614. If, however, every thing material has been done, and only some trifling act remains, the property will pass. As where trees were sold by the cubic foot, and the number in each was ascer-

tained, but there had been no adding up, and thus ascertaining the aggregate number. Held, this did not prevent the title from passing. *Tansley v. Turner*, 2 Bing. N. C. 151. It is not, however, essential to the transfer of title that the separation should be prior to the delivery, and hence where there was a delivery of the whole to the purchaser of a part, it was held to carry with it the right of selection, and was a sufficient delivery to pass the title. *Crofoot v. Bennett*, 2 Comst. 258. And when the vendor has done all that can be required in relation to a portion of the property sold, the title to that part passes, as where a stack of bark was sold at a certain price per ton, and a certain part was weighed and delivered; the vendee was held to have acquired title only in that part that was weighed. *Simmons v. Swift*, 5 Barn. & Cress. 857. And in the recent case of *Kimberley v. Patchin*, 19 New York Rep. 330, it was held that where a specified quantity of grain was sold, its separation from a mass indistinguishable in quality or value, within which it was included, is not absolutely necessary to pass the title; and hence, where the owner of a large quantity of wheat which was lying in a mass at his warehouse, sold 60,000 bushels of it for a specified price, and gave to the vendee a receipt acknowledging himself to hold the wheat subject to the purchaser's order, it was held that the title passed.

§ 654. Neither delivery nor payment are absolutely essential to pass the title to the thing sold. The rule is, that "if nothing remains to be done on the part of the seller, as between him and the buyer, before the goods purchased are to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller." The reason of this is, that the right of property does not depend upon the actual possession, as the vendor may still retain his right of lien for the unpaid price, and yet the goods may belong to the vendee, and devolve upon him the risk of loss. So by agreement the thing sold may remain with the

vendor for storage, and yet be at the risk of the vendee. *Lansing v. Turner*, 2 *John*. 13. But it has been held that when the purchaser of a thing sold has acquired, as against the seller, a right to demand it, the sale is not complete as to third persons, until the payment of the price and delivery of the article; and if neither of these be done, a sale in good faith to a third person followed by payment, and delivery, will transfer the title to him, the first purchaser having no other remedy except his action for damages against the seller. *Lafon v. De Armas*, 12 *Rob. Louisiana Rep.* 598.

§ 655. There are many things relating to delivery important to notice. It may be remarked in the first place, that a delivery which is sufficient to destroy the vendor's right of lien, and to comply with the requisitions of the statute, is always sufficient to pass the title to the vendee. The only proper object of inquiry here, therefore, is, what are the fewest conditions, what the smallest number of facts, that will constitute a delivery sufficient for this purpose. A delivery to the purchaser's agent, or to a common carrier to be carried, is sufficient. So, also, is a delivery on board a ship chartered by the purchaser. But in the case of property consigned, if no agreement exists between the parties, the consignment will be at the risk of the consignor, until the consignee has done some act recognizing the appropriation of it to a particular specified purpose.

§ 656. A symbolical delivery is sufficient when that is the best which the nature of the case admits of. A store of goods may be delivered by handing over the key. The receipt of a storekeeper in possession of the goods may be sufficient. So a transfer of them on the warehouseman's or wharfinger's book to the name of the buyer. The cutting off the spills of wine casks, and marking upon them the initials of the purchaser's name, is sufficient. Delivery of a sample has been held sufficient to transfer title, when some obstacle presents to a complete delivery, and the sample is



taken as part of the quantity purchased, and as the best delivery the circumstances will admit of. The sale of goods at sea is accomplished by the delivery of the documentary evidence of title. So, also, where the property at the time of sale, from its situation, is incapable of delivery, that of the bill of sale or other evidence of title, is sufficient to transfer the property and the possession. It is sufficient to take a bill of parcels and order from the vendor on the warehouseman, and there marking the goods with the initials of one's name; or in lieu of the latter, paying the price. The selecting and marking of sheep in the possession of B, who is desired to retain possession of them for the vendee, has been held to be a sufficient delivery to complete the sale and pass the property.

§ 657. Where nothing but the delivery and acceptance is wanting to complete fully the contract of sale, the vendee cannot, by refusing to accept, throw the risk of loss upon the vendor. The course usually pursued in case of neglect or refusal by the former to pay for and take the goods, is for the latter to sell them at public sale, and charge the vendee with any deficiency in the amount of the sales. In the State of New York it is not held necessary to dispose of them at public sale. They may be sold in the ordinary manner upon giving notice to the other party. *Crooks v. Moore*, 1 *Sandf.* 297.

§ 658. As to the place of delivery, the general rule is, that if no place is designated by the contract, the articles are to be delivered at the place where they were at the time of the sale. But where the sale is to pay a debt by the delivery of specific articles, the balance of authority is, that the property must be delivered at the creditor's place of residence. In some of the New England States, especially Vermont, the practice has formerly been very general of giving notes payable in cattle, grain, and other portable articles, and where no place of payment is designated, the delivery is to be at the creditor's place of residence at the

time the note was given. Where the articles are ponderous and bulky, the rule has been held to be that the debtor must seek out the creditor, or get him to name a place, and if he declines or names an unreasonable one, then the debtor may tender a delivery at a place suitable for the purpose, and presumptively in the contemplation of the parties. The effect of a valid tender of specific articles is to discharge the debtor from his contract, and to transfer the right of property in the article to the creditor.

### QUESTIONS.

What two things essential for the completion of the contract? What the essential provisions of the statute of frauds? What kind of contracts come within the statute? What class do not come within the statute? What is a peculiarity of delivery which is necessary to comply with the statute? What the character of the acceptance? What illustrations as to carrier and order of vendor? What may acts of the parties imply? What illustration? How must acts be in order to be relied upon? When is a delivery of a part a sufficient delivery of the whole within the statute? What four things must a delivery and acceptance negative in order to comply with the statute? What modification in a recent case? What must the written memorandum contain to comply with the statute? What allowable as to number of papers? Where must signature be placed, and of what party? How many different kinds of delivery are there? What is the general rule as to the passing of title to the vendee? What does this usually apply to? What illustration? How if every material thing has been done, and only some trifling act remains? What illustration? Is it essential that separation should be prior to delivery? How is it with delivery of a portion as to passing title in the whole? What illustration? What is the rule as to transfer of title where there is no payment or delivery? What the reason of it? How as to third persons stands a sale until payment and delivery? Which of the three kinds of delivery may be the slightest, and yet be sufficient? How is it with delivery to agent? How on shipboard? What necessary in case of consignment? When is symbolical delivery sufficient? What are some instances of symbolical delivery? When is delivery by sample sufficient? When delivery of goods sold while at sea? What are some other modes of delivery? What is the course to be pursued in case of neglect or refusal to receive the goods? What is the general rule as to place of delivery? What, when sale is made to pay a debt?

What the practice in the New England States? Where is the delivery to be? How, and where, in case the articles are ponderous and bulky? What is the effect of a valid tender of specific articles?

## PART V.

## WARRANTY.

§ 659. There are two kinds of warranty essential to be understood in connection with sales of personal property. These are the *implied*, and the *express*. Of the *implied*, that the most universally conceded is the warranty of title. A person in actual possession of personal property, sells it to another, and delivers over the possession to the vendee. He is held to deliver with it an implied warranty that his title to the article is perfect, and that hence if another claims and dispossesses the vendee of the article or its value, as having the superior title, such vendee has his remedy against his vendor for its value upon this implied warranty. This rule has one limitation, and that is, that the vendor must be in possession of the property he sells. *McCoy v. Archer*, 3 Barb. S. C. Rep. 323. The rule, however, extends to, and embraces negotiable paper, and hence where the holder of a note which was usurious, and uncollectable in his hands, transferred it without indorsement or notice to the vendee, who was defeated in his attempt to collect it; it was held that the party so accepting the transfer, was at liberty to act upon the implied assertion of the validity of the paper, and, if defeated in his attempt to collect it, had his remedy over against his vendor upon this implied warranty. *Delaware Bank v. Jarvis*, 20 New York Rep. 226.

§ 660. By the civil law there is a further implied warranty that a sale for a sound price implies a warranty of soundness against all faults and defects. This is also the present rule in Louisiana and South Carolina, although its permanence in the latter State is a matter of much doubt. The maxim of the common law, as to quality, is *caveat emp-*

tor, the purchaser must himself assume all the risk. He may throw it upon the vendor by requiring an express warranty. And so, also, the law gives him a remedy in case of fraud or deceit. But in the absence of both these the rule is, that the buyer who examines the article himself, must abide by all losses arising from latent defects, equally unknown to both parties. *Swett v. Colgate*, 20 *John*. 196. The doctrine that in the sale of an article there is an implied warranty that it is merchantable, or fit for the purpose intended, has received much countenance, especially in England; but when fully investigated it seems to be the *usage of trade*, the *manufactured goods*, or the *specific purpose*, that raises the implied warranty. *Jones v. Bowden*, 4 *Taunt*. 847. *Laing v. Fidgeon*, 6 *Taunt*. 108. *Grag v. Cox*, 4 *Barn. & Cress*. 108. Some disposition has been manifested towards the adoption of that doctrine in this country. Thus in the sale of provisions for immediate domestic use, it has been held there was an implied warranty that they were wholesome, but otherwise if sold as merchandise. But the old rule of the common law that there is no such implied warranty, is sustained in *Hart v. Wright*, 17 *Wend*. 267; same case, 18 *Wend*. 449. *Waring v. Mason*, 18 *Wend*. 425. *McFarland v. Newman*, 9 *Watts*, 55. This may now probably be considered the settled doctrine applicable to *executed contracts* of sale. In those which are executory, where an article is to be delivered at a future day, or to be manufactured and delivered, there is an implied warranty that the article shall be at least of a medium quality or goodness. In such case, if it comes short of being merchantable, the vendee is at liberty to return it. This is a very reasonable rule, as the delivery in such case offers to the vendee the first opportunity of examining the article. But the right to return it ought to be exercised as soon as the defect is discovered, as the retaining it for any length of time would raise a presumption of acquiescence in its quality.

661. The practice of any deception by the vendor gives

the vendee a choice of two remedies : He may either affirm the contract, and recover damages for the fraud perpetrated upon him ; or he may rescind the contract, return the thing purchased, and recover back what he may have paid for it. *Campbell v. Fleming*, 1 *Adolph. & Ell.* 40. Quite an important question has been made, whether the purchaser's omission to disclose his insolvency to the vendor at the time of the purchase, constitutes such a fraud as will enable the latter to avoid the sale. And it has been held that when the vendor makes no inquiries, and the vendee resorts to no fraud or artifice to mislead, he may remain silent as to his pecuniary circumstances ; but the suggestion was made that a failure to disclose a marked and sudden change in his circumstances for the worse, and which he had every reason to suppose was unknown to the vendor, might be such a fraud as would avoid the sale. *Nichols v. Pinner*, 18 *New York Rep.* 295.

§ 662. An *express warranty* may consist of any positive affirmation made by the vendor at the time of the sale, in relation to the goods sold, and which is intended to have that effect. It is then essentially a contract, and we must look to its terms, to its own limitations and restrictions, to determine what are the rights of the parties. It is to have applied to it a strict rule of construction, the vendor laying himself under obligations to make good his warranty to the letter, whether the quality he has warranted be material or not. And wherever there is an express warranty as to any single point, the law will imply none beyond its express terms.

§ 663. The object of a general warranty is to protect against defects which may not be apparent to the vendee. He seeks by it to save the necessity of any very strict scrutiny, and to throw upon the vendor the risk of all defects which are not open to the common observer. As to all those which are patent, and apparent upon the most careless inspection, they are not covered by the warranty, as they are

not supposed to have entered into the mind of the parties when it was required and given ; as where on the sale of a race-horse the purchaser was told that he was a crib-biter, and had a splint, all which was apparent, it was held that a warranty that the horse was sound wind and limb, at the time of the sale, did not extend to those defects. *Margetson v. Wright*, 5 *Moore & Payne*, 606. But to exonerate the vendor from liability in such a case, the circumstances must furnish an irresistible presumption that the vendee had full knowledge of the defect. In regard to all such as are not clearly obvious, the vendee has a right to rely upon his warranty. It is essential that the warranty should be made either at the time of the sale, or previously, and with express reference to it. If subsequently, it can form no inducement to the contract, which must, therefore, be wholly without consideration.

§ 664. A question has been raised regarding what may be considered as amounting to a warranty ; whether *mere words of description* which are contained in a bill of parcels, a receipt, or any other written memorandum of sale, should be held to constitute an express warranty. Where an express warranty and a written description are contained within the same instrument, a defect which prevents the article from answering the description, but does not violate the warranty, will give no right of recovery to the vendee as upon a breach of warranty. As where upon the sale of a horse a receipt was given "Received of A B £10 for a grey four-year old colt, warranted sound in every respect," it was held that so far as concerns the descriptive portion of the receipt, the vendee could not recover without proving a wilful misrepresentation, as that was not covered by the warranty. *Budd v. Fairmaner*, 8 *Bing.* 48. Where there is no express warranty contained in the instrument, the description, if clear in its terms, and amounting to an affirmation that the goods sold correspond thereto, will have the effect of a warranty.

§ 665. In the case of a sale by sample, there may be a

warranty that the bulk corresponds to the sample. The most that can here be claimed is, that the whole quantity of goods sold answers to the sample, and if there proves to be any latent defect in that, as well as in the bulk, the vendor will not be responsible, as an opportunity is presented him of fully examining the sample. But it is not every sale where a sample is exhibited that will create a warranty. A mere sale by sample does not have that effect. The rule is, that where the goods in their bulk are fully exposed to the purchaser's examination, he is bound to make it, and cannot claim damages without showing an express warranty. That the mere exhibition of the sample at the time of the sale can never raise an implied warranty as to the nature or quality of the bulk of the commodity, but that other evidence is required to show that both parties mutually understood that they were dealing with the sample, upon an agreement by the vendor that the bulk of the commodity corresponded with it. And that even where a personal examination was not practicable, that of itself furnishes no sufficient ground to say that the sale was by sample. *Hargous v. Stone*, 1 *Seld.* 73. *Beirne v. Dord*, 1 *Seld.* 95.

#### QUESTIONS.

How many kinds of warranty on sales of personal property? What are they? What instance of implied warranty? What the limitation? What embraced within the rule? What further implied warranty by the civil law? Within what States does it prevail? What is the maxim of the common law? On whom may the vendee throw the risk, and how? How, in case of fraud or deceit? In absence of both, what is the rule? What is the rule in case of executory contracts? What the reason of it? When must the right to return articles be exercised? What remedies does the practice of deception give to the vendee? What may an express warranty consist of? What the rule of construction applied to it? What is the object of a general warranty? What defects are not covered by the warranty? What illustration? What, in such case, must circumstances furnish? To what defects does the warranty apply? When must the warranty be made? How, if made subsequently? And why? Do mere words of description contained in

an instrument embracing a warranty amount to one? What illustration? How, where there is no express warranty contained in the instrument? What may there be when the sale is by sample? What is the most that can here be claimed? Does a mere sale by sample create a warranty? What is the rule in such sales? Does a mere exhibition of a sample raise an implied warranty? What other evidence is required to have that effect? Will the fact that personal examination is not practicable afford presumption that sale was by sample?

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## CHAPTER V.

### CONTRACT OF TRANSFER OF PROPERTY.

#### SECOND.—BY ASSIGNMENT.

##### PART I.

#### ASSIGNMENT. BY WHOM MADE, ITS NATURE, MANNER OF EXECUTION, AND EFFECT.

§ 666. The assignment here intended is that which is voluntarily made by a debtor on the eve of insolvency. The frequency of its occurrence in this country renders some knowledge of it essential to business men. It is mainly the growth of less than half a century, and yet it comprises a large body of law. The general rule is, that all natural persons who are competent to enter into contracts, are also competent to make voluntary assignments.

§ 667. A question of much difficulty has presented itself regarding the right of one copartner to make a valid assignment of the copartnership effects, either without the concurrence, or against the will of the other or others. The right of partners to unite in such disposition of their partnership effects for the payment of partnership debts has never been doubted. Nor would the execution by one in the partnership name, and with the concurrence of the other, leave any doubt of its validity. In the State of New York it has been held that one part-



ner, without the consent of his copartners, may make a valid assignment in the name of the firm, of all or any part of the partnership effects, *directly*, to a firm creditor in payment of a partnership debt, but that there was no implied authority derived from the partnership relation, that could empower one, without the consent of the others, to make a general assignment of the partnership effects to a trustee, for the benefit of creditors, and giving preferences to one class of them over another. *Egberts v. Wood*, 3 *Paige*, 517. *Havens v. Hussey*, 5 *Paige*, 30. In some other States the right is fully conceded to assign to trustees in the ordinary manner. *Robinson v. Crowder*, 4 *McCord*, 519. *Mills v. Barber*, 4 *Day*, 428.

§ 668. Corporations have, also, at common law, the same right to assign their corporate property in trust for the benefit of their creditors. *Catlin v. Eagle Bank*, 6 *Conn.* 231.

§ 669. The nature and effect of the assignment is to vest all the assignor's property and rights of property in the assignee, to be disposed of upon the trusts stated in the instrument. The assignee occupies the position of a trustee, and the creditors are those beneficially interested in the execution of the trust. The first difficulty presenting itself in the way of voluntary assignments is the provision in 13 *Eliz.* and substantially the same in 2 *R. S.* 137, § 1, and which is declared by Lord Mansfield in *Cadogan v. Kennett*, *Cowp.* 432-434, to be a principle of the common law, viz., that *all conveyances made to delay, hinder, and defraud creditors shall be absolutely void*. This difficulty, however, is overcome in *Brashear v. West*, 7 *Peters*, 608, holding that such assignment is not *per se* fraudulent, and that the right to make it results from the absolute ownership which every man claims over that which is his own. The pressure of the difficulty has, however, been felt not so much in allowing insolvent debtors to assign their property to pay their debts *pro rata*, because bankrupt and insolvent laws accomplish the same thing, but in permitting them to assign, and so

shape the trusts in the instrument, as to give preferences in the distribution of their property to some creditors over others. That doctrine, however, is now clearly established. *Mackie v. Cairns*, 5 Cowen, 547.

§ 670. The assignment being the act of the assignor alone, it has been made something of a question whether the assent of the creditors should not also be required. That of the preferred creditors will always be presumed. So, also, as to all those who are benefited by it. Assent may be given at any time, and receiving any thing under it always presumes it. In the State of New York it is not held necessary that a creditor should be a party to it, or signify his assent, but the assignee must consent to receive it and to enter upon the performance of the trusts created by it. His receipt of it without objection or qualification would be sufficient.

### QUESTIONS.

What assignment is here intended? Who may execute such assignment? What is the rule in relation to partners? What assignment can one make in New York without the concurrence of the others? What the rule in some other States? What the rule as to corporations? What the nature and effect of an assignment? What is the position of the assignee? What is the difficulty which an assignment had to contend with? On what principle overcome?

### PART II.

#### ITS PROVISIONS IN REFERENCE TO ITS VALIDITY.

§ 671. The provisions contained in voluntary assignments by insolvent debtors, have proved a very fruitful source of litigation. The object of the debtor has been twofold: *first*, to reserve as much property, or power over property, or means of subsisting upon it, as was possible; and *second*, to make use of the assignment as a coercive force, to compel all those who derive any benefit under it, into a release of all their claims against the assignor, as the condition upon which they can receive such benefit. In these two directions

will be found the lines of decision, effectually meeting and restraining all efforts for the accomplishment of this twofold object.

§ 672. The first question arising relates to the right of the assignor to reserve a portion of his property from passing under the assignment, and yet leave the validity of the instrument undisturbed. He should except from its operation all those articles of household property which are not liable to seizure and sale under execution. The reservation of other property would not affect the validity of the assignment, but it would not then be a general one, and the object of the assignor in removing all his property from seizure and sale under executions, with the view of directing, himself, its application, would fail to be accomplished. The part not assigned would be open to application under judgments and executions. *Carpenter v. Underwood*, 19 *New York*, 520.

§ 673. But it is quite another question whether the assignor can be permitted to secure, in the assigned property, any right or interest, or whether he can make the assignee his trustee, for the purpose of enabling him to enjoy the property, or any part of its income. The law can concede to him no such right, and any such provisions in the assignment would render the whole instrument void. *Mackie v. Cairns, Hopkins*, 373, and same case in 5 *Cowen*, 547. Neither can the assignor be permitted to insert in his assignment a doubtful claim of his wife, giving that a preference in payment, or a fictitious claim, with a view of himself reaping the full benefit of it. An assignment which should embrace any such attempts to secure accruing benefits to the assignor would render utterly void the assignment.

§ 674. The assignor is generally very desirous of selecting his own assignee, as he may hope to receive many favors from his friendly disposition. This he may do within certain limits. The usual course is to assign to the creditor who is the most deeply interested in the assigned property. The

only restriction which the law interposes in this respect is, that the assignee shall not be insolvent to the knowledge of the assignor. He shall not knowingly place his property in the hands of a man who is utterly incapable of responding to creditors for any damages they may suffer growing out of any system of favoritism of which he may have received the benefit. *Reed v. Emery*, 8 *Paige*, 417. *Browning v. Hart*, 6 *Barb.* 91-95. The question has further been presented, whether in case the assignee appointed should wish to resign, a right can be reserved in the assignment, by virtue of which the assignor can exercise the power of appointing another to act as a substitute, and it is held that no such right can be reserved. *Plank v. Schermerhorn*, 3 *Barb. Chan.* 644.

§ 675. In the earlier period of assignments, and before the law had come to settle clearly their provisions, it was a common custom to introduce a provision, authorizing the assignee to sell the assigned property upon credit. There was not wanting judicial authority to sanction this custom. *Rogers v. De Forest*, 7 *Paige*, 272. Such a provision is now regarded as vesting a discretion in the assignee by the instrument itself, and which he might greatly abuse, and yet point to the assignment as his authority; and although he may undoubtedly take upon himself the responsibility of exercising a discretion in that respect, yet it must be upon his own responsibility, and if given in the instrument will render it void. *Nicholson v. Leavitt*, 2 *Seld.* 510. So far in this direction have the courts gone, that where the provision was that the assignee should convert the assigned property into money or *available means*, it was held that the conversion into *available means* was equivalent to an authority to sell on credit, and hence rendered void the assignment. *Brigham v. Tillinghast*, 3 *Kern.* 215. So on the directly reverse side of the question the point has been presented, whether a restriction contained in the assignment to sell *for cash only*, rendered the instrument void, and it was

held that it did not. *Carpenter v. Underwood*, 19 *New York*, 520. Upon the same principle it is incompetent to provide in the assignment for a delay of sale until higher prices may be obtained. *Hart v. Crane*, 7 *Paige*, 37.

§ 676. As these instruments are often required to be executed with very little delay, the assignor may not unfrequently desire to execute and deliver the assignment, thus placing his property beyond the reach of being applied on executions, and at the same time to reserve to himself the right of making such future preferences as he may, upon more mature reflection, deem advisable. This the law will not permit him to do. *Averill v. Loucks*, 6 *Barb.* 470. Neither can he be permitted to vest in his assignees the power to give preferences after the assignment has been executed and delivered. *Boardman v. Halliday*, 10 *Paige*, 223.

§ 677. Another question in relation to which there has been a diversity of decision, relates to the insertion of a provision in the assignment authorizing the assignee to compound with the creditors of the assignor. Such a provision in Illinois renders void the assignment. *Hudson v. Maze*, 3 *Scamm.* 578. And although in the State of New York, in one or two cases, its effect has been considered questionable, yet the point has been presented in a late case, that of *Dow v. Platner*, 16 *New York*, 562, and it was held that such a provision did not render void the assignment. An assignment once made should be irrevocable, and no right exists to reserve in or by it a power of revocation. *Riggs v. Murray*, 2 *John. Chan.* 565. Same case, 15 *John.* 571.

§ 678. Another question in which the judicial policy of the State of New York, as proclaimed in its highest courts, has experienced a change, relates to what kind of assignment can be made by a manufacturer who is compelled to make one while his factory is in full operation, and his stock is in all the different stages of manufacture, from the raw mate-

rial up to the completed article. The point here is, whether he must make the assignment directing an immediate sale of all his effects, including the stock in its then condition, when very little would be likely to be realized from it; or whether he may authorize the assignee to work up the stock on hand, and if necessary to make purchases of any materials necessary for that purpose, and to reimburse all expenses thus incurred, from the avails of the assigned property. This question arose in Connecticut in *Kendall v. The New England Carpet Company*, 13 Conn. 383, in which it was held that such an authority, under such circumstances contained in an assignment, did not render it void. The same doctrine was affirmed in the Court of Errors in the State of New York, in the case of *Cunningham v. Freeborn*, 11 Wend. 240. But in the late case of *Dunham v. Waterman*, 17 New York Rep. 9, this doctrine is overruled, and such a provision declared to have the effect of rendering the assignment fraudulent and void, simply in virtue of this provision. The tendency for some time has been to pronounce such assignments void where any discretion is given to the assignee by the instrument. It is not denied but what the assignee himself may, if the case justifies it, exercise such a power, and be protected by the court, but if so he must do it upon his own responsibility, and not refer to the assignment as his authority. The principle as now settled is, "that a debtor who makes a voluntary assignment for the benefit of his creditors, may direct, in general terms, a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied, but beyond this, he can prescribe no conditions whatever as to the management or disposition of the assigned property. In all other respects, the assignee must be left to act under the ordinary rules and principles which apply to trustees in analogous cases."

§ 679. It is usual in the making of assignments to attach

to them an inventory, containing a specification of the property assigned, describing it with sufficient accuracy, and also schedules containing lists of debtors and creditors, and stating the amounts due from and to each respectively. The preferences in the distribution of the assigned property are generally made by means of classifying creditors in the schedules thus affixed. Two questions have here arisen, the *first*, whether such inventory or schedule must be affixed to give validity to the assignment, and the *second*, whether, in case such inventory is affixed, the assignment can convey any property not specified in it. The first is answered by the case of *Keyes v. Brush*, 2 *Paige*, 311, deciding that an absolute assignment of all the assignor's property and choses in action, containing a provision that such assignor would, with all convenient speed, make out an inventory of such property and choses in action, and which, when so made out, *was to be considered a part of the assignment*, had the effect to convey a present interest to the assignee, and that the making out and attaching or delivery of the inventory was unnecessary to give validity to the assignment. It was a mere matter of evidence, which, if not done, might be supplied in some other way. The second is answered by the case of *Platt v. Lott*, 17 *New York Rep.* 478, holding that where there is an assignment, professing, on its face, to be of all the debtor's property, and within it was contained the statement that said property was to be "more fully and particularly enumerated and described in a schedule annexed," passed all the property of the assignor, whether contained in the schedule or not.

§ 680. The extent to which a debtor can legally go in distributing his property to pay debts has been tested in the case of *Murray v. Judson*, 5 *Seld.* 73, in which the point of inquiry was, whether a debtor could, in his assignment, direct the payment of a debt which was both usurious in its inception, and also embraced in a judgment irregularly entered up. It was held that there was no legal obligation

upon the debtor to avail himself of the statutes against usury to avoid the payment of a debt which was otherwise justly due; and as to the irregularity in the entering up of the judgment, that being a defect which the party to it could only take the advantage of, and one, therefore, which it was in his power to waive, that could present no obstacle to his directing its payment.

§ 681. The inquiry may be made as to the effect on the whole assignment of the introduction of a single fraudulent provision into it, and the answer is that it avoids it wholly, and that no interest passes under it to the assignees as against any creditor not assenting to it. *Goodrich v. Downs*, 6 *Hill*. 438.

§ 682. Another question which is one of vast importance, and which has led to much diversity in decisions, relates to the right or power of the assignor to assign his property under such restrictions, limitations, and conditions as that, if received at all by the creditors, it shall be in full of their demands, they severally executing releases of their debts. Unless such provision is introduced, and can be legally sustained, the effect of an assignment is merely to transfer property to pay debts, in the order in which it is directed, and to the extent to which it will go. And so far as it goes, it operates to extinguish the debts, leaving any balance remaining still good against the debtor and his future earnings. The question here presented is, how far can such debtor be permitted to coerce his creditors into the giving of releases as a condition upon which they are permitted to receive any of the property assigned. The point has several times been presented for adjudication. In South Carolina, *Niolan v. Douglas*, 2 *Hill's Chan. Rep.* 443, a debtor in failing circumstances executed an assignment of his whole property to trustees in trust for the benefit of all such creditors as should, within six months, establish their demands, accept dividends, and give releases in full, and excluding others who should refuse to comply. A bill was filed by a creditor, who refused



to accept, to set aside the deed of assignment as fraudulent and void. It was held valid. The same general principle will be found sustained in *Lippencott v. Barker*, 2 *Binney*, 174. *Halsey v. Whitney*, 4 *Mason*, 206, and *Brashear v. West*, 7 *Peters*, 608. The latter case holds that to be the doctrine in Pennsylvania. But a different judicial policy is adopted, holding that the introduction of such a coercive provision will avoid the assignment in the States of Connecticut and New York. In the former, see the case of *Ingraham v. Wheeler*, 6 *Conn.* 277. In the latter, the question has come up in several cases, and finally went to the Court of Errors in the case of *Wakeman v. Grover*, 11 *Wend.* 187. In the latter State, however, it is held entirely competent for the assignee to make a personal agreement to procure the debtor's discharge without its vitiating the assignment. *Hastings v. Belknap*, 1 *Den.* 190. And so, also, where there is an exchange of notes, a provision in the assignment directing the payment of one note provided the other is given up, will not invalidate, as both are viewed in the light of one transaction and one debt. *Oliver Lee Bank v. Talcott*, 19 *New York Rep.* 146.

§ 683. In the State of New York, an assignment may safely be pronounced fraudulent and void, where it either reserves some portion of the assigned property, or a part of the interest or income thereof, to the use of the debtor or his family ; or directs the surplus, after paying certain specified creditors, to be returned to the assignor, leaving other debts unsatisfied, as in *Barney v. Griffin*, 2 *Comst.* 365 ; or where it imposes terms upon the creditors as conditions upon which they are to participate in the distribution of the assigned property, or creates any trust which is to operate by way of coercing the creditors into a release of their claims ; or where it reserves to the assignor the right to appoint the uses to which the property is to be applied in the future ; or where it postpones to a future period the sale of the trust property or the distribution of its proceeds ; or where it

exempts the assignee from responsibility for all losses sustained by the trust property not occasioned by his gross negligence, or wilful misfeasance, as in *Litchfield v. White*, 3 *Seld.* 438. To sustain an assignment preferring creditors, in this State, it must be absolute and unconditional, must devote the assignor's property to the immediate and unqualified payment of his debts; must contain no reservations or conditions for the benefit of the assignor; and must be free from all provisions calculated to extort from the fears of the creditor, a compromise, discharge, or other favor.

### QUESTIONS.

What are the objects of the debtor in making voluntary assignments? In what direction are found the lines of decision? Can the assignor reserve from passing under the assignment a portion of his property without destroying its validity? What would be the effect of such reservation? Can the assignor secure in the assigned property any right or interest, or make the assignee his trustee for any purpose? Can he insert in the assignment a doubtful claim of his wife, or a fictitious claim, giving it the preference? Can the assignor select his own assignee, and within what limits, and subject to what, can he make such selection? Can he reserve the right to make such appointment in case of resignation? Can assignor authorize assignee to sell assigned property on credit? Can he authorize assignee to convert assigned property into money or available means? Can he restrict assignee to sell for cash only? Can he direct delay until higher prices can be obtained? Can he reserve the right to make future preferences? Can he vest in his assignees the power to give preferences after completion of the assignment? Can the assignee be authorized to compound with creditors of assignor? Can a manufacturer make assignment and direct manufactory carried on by assignee with assigned property? What is the rule at present as to prescribing conditions in regard to management or disposition of assigned property? Must assignor attach inventory of assigned effects to the assignment, or schedules containing lists of debtors and creditors? By what means are creditors generally classified with a view to making preferences? Suppose inventory affixed, can assignment convey any property not specified in it? Can assignor direct in his assignment, the payment of a usurious debt? Can he direct the payment of a judgment irregularly entered up? What effect on the whole assignment has a single fraudulent provision that enters into it? Can the assignor annex such

conditions to the assignment as will compel his creditors, if they receive any benefit from it, to execute a release of their debts? What effect if assignee make a personal agreement to procure the debtor's discharge? What effect if, in case of an exchange of notes, assignor directs the payment of one only on condition that the other will be given up? What are the provisions any one of which in the State of New York being introduced into an assignment will render it void? What in the State of New York is necessary to sustain an assignment preferring creditors?

### PART III.

#### DELIVERY OF PROPERTY TO ASSIGNEE, AND HIS RIGHTS AND DUTIES.

§ 684. The law always regards the possession of personal property as *prima facie* evidence of title. A man being the presumed owner of the personal effects in his possession, is held out to the community as entitled to credit to the extent of such property as he may thus be in possession of. The question then comes up how far the law will permit a man, really insolvent, to make a valid disposition of personal property either by sale or assignment, and yet continue to retain such property in his own possession; and thus by holding himself out to the community as its owner, be enabled to obtain a credit upon the strength of it, and then, when payment is sought to be enforced, defeat his creditor through the superior title of the party to whom he had sold it. Will the law sanction such a sale or assignment under such circumstances? The principle was settled in the Star Chamber as early as the reign of Elizabeth, that among other indicia of fraud was the remaining in possession, and exercising acts of ownership over goods after the execution of a bill of sale of the same for a valuable consideration. *Twynes' case*, 3 *Coke*, 80.

§ 685. It has never been doubted but that such attempted sale or assignment was a badge of fraud, and might afford sufficient *prima facie* evidence of it to avoid the sale, and thus render the property liable to the payment of those debts presumptively incurred upon the strength of it. But

the difficulty has been to determine, how far such evidence should be permitted to go ; whether it should be conclusive, and thus stop the parties from denying the existence of such fraudulent intent as would render void the attempted transfer ; or whether it should rest in *prima facie* presumption, allowing the parties implicated to disprove the fraudulent intent, thus opening the whole transaction for investigation, and rendering it a question of fact for the decision of a jury. The latter is the view that has been taken of it in England. *Eastwood v. Brown*, 1 *Ryan & Moody*, 312. In this country the Federal Judiciary, and the courts of Virginia, Kentucky, and Pennsylvania, are inclined to take the view first mentioned. In Massachusetts, Connecticut, Maine, and some other States, such possession is held strong *prima facie* evidence of fraud, but susceptible, nevertheless, of an explanation consistent with good faith. In the State of New York there has been some diversity of decision, but there is now a statutory provision. 2 *R. S.* 136, § 5. The general doctrine is now understood to be, That a sale or assignment of goods by a failing debtor, to be valid as against creditors, must be accompanied by an actual and continued, as well as a nominal and constructive change of possession. *Butler v. Stoddard*, 7 *Paige*, 163. The only safe course to be pursued is for the assignee to take immediate possession, either by himself or his agents, and to retain such possession until the effects are ultimately disposed of. The employment of the assignor merely as agent, where in the exercise of such agency he would have devolved upon him the possession and control of the assigned effects, could not be done without the hazard of defeating the assignment.

§ 686. An assignment is only fraudulent and void as to those creditors who choose to question its validity. In regard to its immediate parties, the assignor and assignee, where the latter has accepted the trust, and also to all such creditors as choose to take advantage of its provisions, the assignment, however fraudulent it may really be, is a valid

and binding instrument. Neither one of these parties are at liberty to question it. The only party who enjoys this liberty, and has also sufficient interest to enable him to do so, is the creditor who refuses to acquiesce in, or receive any thing under the assignment. *Ames v. Blunt*, 5 *Paige*, 13.

§ 687. It follows as a result from this doctrine, that the assignment, however defective, is a good and valid instrument until its validity is called in question by the proper party. This may never be done, and hence the possibility that all the assignor's property may be disposed of, and its avails distributed, under an assignment so very defective as not for one moment to stand before a judicial tribunal. The fact that the instrument is good and valid until questioned, not only authorizes, but renders it the duty of the assignee, to take immediate possession of the assigned property, and to proceed with as little delay as possible in selling and converting the same into money, and disposing of the latter as directed by the instrument. He has even been held guilty of a breach of trust if he delays a sale for the purpose of retailing the goods. *Hart v. Crane*, 7 *Paige*, 398.

§ 688. Such being the plain duty of the assignee, the law will protect him in all his acts done in good faith under the assignment. As the instrument is deemed valid until a creditor, by filing his bill, calls it in question, the assignee has the benefit of that validity, and cannot be charged with the proceeds of any assigned property which he may have sold and converted into money, and distributed among preferred creditors, prior to the exhibiting, by the creditor, of his bill, to avoid the assignment. *Averill v. Loucks*, 6 *Barb.* 470.

§ 689. A creditor who designs to question an assignment, is in no condition to do so, until the validity of his claim is legally settled by a judgment. This being obtained at law, and, together with the execution issued thereon, being a lien upon the real and personal estate of the debtor, entitles him to go into equity, and ask to have any fraudulent assign-

ment under which the debtor's property is claimed, set aside, so that the obstruction may be removed, and he left at liberty to enforce the lien under his judgment and execution. *Mohawk Bank v. Atwater*, 2 *Paige*, 54.

## QUESTIONS.

How does the law regard possession of personal property? How is a man in possession of effects held out to the community? Will the law permit an insolvent debtor to make a valid disposition by sale or assignment of personal property, and yet retain the possession? What has never been doubted as to such attempted sale? What has been the difficulty? What two views have been taken as to the effect of such an attempted transfer of property? How regulated in the State of New York? What is the general doctrine now understood to be? What is the only safe course for the assignee to pursue? Can he, with any safety, employ the assignor? Against whom is an assignment only fraudulent and void? How is it as to its immediate parties, assignor and assignee, and to such creditors as choose to take advantage of its provisions? Who is the only party who is at liberty to question it? How long is an assignment a good and valid instrument? May it possibly never be called in question? What does the fact of its being good and valid until questioned, require and render the duty of the assignee? Wherein has he been guilty of a breach of trust? In what will the law protect the assignee? When cannot an assignee be charged with the avails of assigned property distributed under the assignment? What must a creditor do before he can go into equity and question an assignment? What does the judgment and execution issued thereon entitle him to do?

## BOOK IV.

### R E M E D I E S .



#### CHAPTER I.

##### LIEN.



##### PART I.

###### WHAT IT IS, AND TO WHOM APPLICABLE.

§ 690. LIEN consists in the right to detain property until the price, or some charge which is due on it, is paid. Thus defined, it implies that the property in relation to which the right is to be exercised, is in the possession of the party claiming its exercise. This is true universally as to all liens at common law. But in maritime law there are liens existing independently of possession, either actual or constructive. Thus bottomry bonds give liens upon foreign ships not in the possession of the holder. But in such case there is no vested lien, nothing but what is inchoate, conditional, and imperfect, until the vessel has completed its voyage. So, also, liens exist in equity independent of possession. The vendor, for instance, has a lien upon the land he has sold for the unpaid purchase money. So, also, an equitable lien may be created for a thing not at the time in existence, but which is soon expected to come into it, as where articles are to be manufactured,

and liens given in advance upon them. In such case also there is no present vested right, but the liens take effect and become perfected when the articles come to exist. The rule in equity is stated as a clear result from all the authorities, "that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in use or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy." *Mitchell v. Winslow*, 2 *Story*, 630, 638, 64. All liens are at best but qualified rights. They are not founded on property, but always suppose the property to be in some other person, and not in him who sets up the right.

§ 691. The existence of the lien does not prevent the party entitled to it from pursuing his remedy at law, and collecting the debt or charge out of which the right is derived. When goods subject to a particular lien are in part delivered, the question may arise as to the right of the party in possession to retain the part undelivered, and whether for the whole, or what portion of the debt or charge. The rule is, that all the articles undelivered may be retained, and held to secure the payment for all the labor, skill, or expense laid out upon the whole, under the same contract, between the same parties, thus constituting one debt. *McFarland v. Wheeler*, 26 *Wend.* 467, 480.

§ 692. The following classes of persons may be entitled to their right of lien.

1. Bailees, who perform labor and services upon the thing bailed, at the request of the bailor.

2. Innkeepers have a lien upon the baggage, for the accommodations of the guest.

3. Common carriers have a lien upon the goods carried for the amount of their freight.



4. Vendors may, under some circumstances, have a lien upon the goods sold for the payment of the price.

5. Agents or factors have a lien upon the goods of their principals, for advancements made for their benefit.

Whoever may be the party who is entitled to exercise this right, the character of the lien is always essentially the same.

### QUESTIONS.

What does a lien consist in? What does it imply? Of what class of liens is this universally true? What liens may exist independent of possession? What instance? How do liens exist in equity? What instance? What are instances of equitable lien? When do such liens take effect? What are all liens? Are they founded on property? What do they suppose? What is not prevented by the existence of lien? When goods subject to a particular lien are in part delivered, what is the right of the party in possession as to the part undelivered? What classes of persons are entitled to the right of lien? Is the character of the lien always essentially the same?

## PART II.

### ITS VARIETIES AND MODES OF ACQUISITION.

§ 693. Liens in whatever way acquired, are of two kinds, *particular* or *special*, and *general*. The first give only a right to retain the particular thing in relation to which the lien exists. The bailee may retain the article upon which his labor was expended, the common carrier the goods he has transported, and the vendor the articles of property he has sold. This kind of lien is favored by the law, and construed liberally. Its existence is not affected by the efflux of time since the debt or charge giving it came into existence. Such debt or charge may be barred by the statute of limitations, and yet the lien remain perfect. The thing itself, being in the possession of the party claiming the right, will effectually secure its continuance until payment of the debt or charge. So, also, will the law protect it not only against the owner, but also his creditors, and will not permit it to be seized and sold under executions issued on judgments

obtained by the latter against the former, except subject to the lien. The *general liens* are those that are claimed in respect of a general balance of accounts. These belong more to factors or agents than to any other class; being claimed by them on a general balance of account against their principals. These are not favored by the law, and are, therefore, always subject to strict rules of construction.

§ 694. From the origin of the common law, there have always existed classes of persons, who were compelled by its policy to receive goods for certain purposes, and to render to them, or their owner, certain services. The innkeeper and the common carrier both afford illustrations of this class. Both these offering to the public to perform the services appropriate to each, are bound by acceptances of their offer, so far as their means and accommodations extend. The law could not well devolve upon them this obligation of receiving and rendering service, without, at the same time, giving them extraordinary remedies. This is done by the gift of lien; the carrier being entitled to retain the goods he had transported until paid his freight, and the innkeeper the baggage and goods of his guest, until paid for his accommodations. This was probably the origin of all particular liens, and will now serve to explain some apparently anomalous cases, otherwise difficult of explanation. The lien of an innkeeper, on property intrusted to his charge, only exists where the party owning the property was a guest; and where horses are sent to an inn, to be kept for a person not a guest, the innkeeper has no lien on them for his charge of keeping. *Grinnel v. Cook*, 3 *Hill*, 485. He is in this respect on the same footing as a livery stable keeper.

§ 695. A distinction has also been taken of this description, that where a party has bestowed labor and skill upon an article, and by these means essentially changed its properties and its character, he has a lien on it for his charge. An instance of this would be a trainer of a race-horse, in which, by his instruction, he works a marked improvement

in the character and capabilities of the animal. But the rule stops with this change of properties and character, and does not extend to the expenditure of labor and money on the article claimed to be retained, but which produces no alteration in it. Thus a livery stable keeper has no lien on the horse for its keep. The distinction here is pointed out in the two cases of *Wallace v. Woodgate, Ryan & Moody*, 293, and *Bevan v. Waters, Moody & Malkin*, 236, the one allowing the right of lien, the other denying it. That is, "that in the case of the livery stable keeper, who does nothing to the horse except supplying him with hay and oats, there is no lien, but where work is done by training a horse, there is a right of lien. In case of a livery-stable keeper who dressed a horse, if the claim for dressing could be separated in that respect, there might be some right of lien, but if an entire claim, compounded of feeding and dressing, is set up, it must attach to both; the trainer probably claimed for nothing but training, and so his claim was allowed." The two principles, therefore, upon which the common law right of lien may reasonably rest, are twofold.

1. Where the party to whom it is given is compellable to receive the property either for the purpose of carriage or safe custody, or for any other legal purpose, and,

2. When such party has, by his own capital or labor, changed the quality or properties of the thing at the instance or request of the owner. In such case his own labor has entered into, and so combined with, the thing itself, as to give him an interest in it.

§ 696. The question has several times arisen as to the rights of an innkeeper and common carrier to retain property, as against the owner, which had been confided to them by a thief to keep, or to transport, in the course of their business. The elementary writers or some of them may be found asserting that where a common carrier, without any knowledge or suspicion of wrong, receives goods from a thief to transport, and carries them accordingly, he is enti-

tled to retain them for the price of carriage against the claim of the true owner. This assertion rests mainly or entirely on the authority of a *nisi prius* case which has never been reported, but is referred to by Lord Holt in *Yorke v. Greenough*, 2 *Ld. Raymond*, 866, as the case of the *Exeter carrier*, in which such right was recognized on the alleged ground that the carrier was obliged to receive the goods, and should therefore be entitled to his lien. The right of demanding his pay in advance, as a compensation for the obligation to receive, seems to have been overlooked. The same doctrine was incidentally recognized in *King v. Richards*, 6 *Whart.* 418. But the general understanding of the law now is, that no such right exists in the carrier, and in this country that point has been several times so decided. *Fitch v. Newbury*, 1 *Doug.* 1. *Buskirk v. Perrin*, 2 *Hall*, 561. *Robinson v. Baker*, 5 *Cush.* 137. But in the case of an innkeeper a different result has been arrived at. He has been held entitled to his lien, as against the claim of the owner, if the horse was brought to the inn by a thief, and he had kept it without any knowledge or suspicion of wrong. *Black v. Brennan*, 5 *Dana*, 312. 3 *Hill*, 490. The two cases are distinguishable in this, that it is clearly for the benefit of the owner to have the horse kept by the innkeeper, as it preserves the horse in life for his future use, and hence he is here held liable to pay. But it is not for his interest to have his property transported by the carrier into a distant part of the country, and he is not, therefore, compelled to pay for its carriage before recovering it of the carrier.

§ 697. No lien can exist in favor of the vendor or bailee without the existence of a present debt or charge, and any suspension of the right to demand immediate payment, destroys the lien. The giving of credit to the vendee, the taking of a promissory note on time, or an agreement that the goods may be taken immediately, each constitutes such a suspension, as, for the present, to destroy the lien. There

is, then, no debt due until the expiration of the credit, or maturity of the note. If, in the mean time, the vendor retain the possession, and the goods remain with him until the credit expires, or the note falls due, and the price still remains unpaid, the right of lien revives, the same as originally possessed. Equity will under certain circumstances create a lien where none existed at law ; as when by mistake of the attorney a judgment was not docketed in a county, so as to make it legally a lien upon the real estate lying therein, but such real estate was afterwards sold, and the judgment debtor and the purchaser both supposing the judgment to be a valid lien, the latter undertook to pay it, making it a part of the consideration of the purchase. The debtor became insolvent, and the judgment turned out to be for a larger amount than had been represented to the purchaser at the time of the purchase. Finding it had not been made a legal lien, and was for a larger amount, he declined paying it, but the court decreed its payment. *Haverley v. Beeker*, 4 Comst. 169.

§ 698. The factor or agent has a general lien, which gives him a right to continue possession, not only for demands specifically arising out of the thing retained, but also for the general balance of accounts in respect of all dealings of the like nature. This not only covers charges upon the particular goods, but includes also all advances made, and responsibilities incurred, in the execution of his agency. All moneys actually disbursed on account of the goods of his principal, and all acceptances paid, or even outstanding, and not yet due, come under this principle. One question here arises relating to what extent this lien can be specifically exercised ; whether it extends over all the principal's property in the hands of the agent, so that he would be entitled to hold the whole for that purpose ; or whether he is bound to restrict it to just what will secure him on his general balance, leaving the rest at liberty to be disposed of. In *Jolly v. Blanchard*, 1 Wash. 252. Washington, Justice, says,

he might have retained such part of the goods as would have been sufficient to secure him, or have consigned the whole to his friend here, to deliver them up on being paid what was due. Such a lien is not limited to the goods, but extends, also, and covers the proceeds and securities received, in the regular course of business, upon their sale. Their avails come to occupy the place, and be subjected to the same lien or charge, as the goods themselves.

§ 699. There are other sources of lien besides the common law. One of these is to be found in the *agreement of the parties*. As parties have the control of their own property, and their own business, they can, by agreement with each other, either avoid or create a lien just as they may prefer. For the establishment of such a lien, a positive agreement is not always required. A mere notice brought home to the other party may be sufficient. Thus where at a public meeting of a number of dyers, pressers, &c., an agreement was entered into that they would not receive any more goods to be dyed, except upon condition that they should have respectively a lien on those goods for their general balance. It was held good, and that any one who, after notice, delivers goods to either of these persons, must be considered as having assented to those terms, and hence delivers them subject to such lien. *Kirkman v. Shawcross*, 6 *T. R.* 14. It was formerly thought, that where parties had made with each other a special contract, providing therein for the payment of a fixed sum, all right of lien was impliedly abandoned. But this doctrine, on a more thorough examination, in *Chase v. Westmore*, 5 *M. & Selw.* 180, and in *Pinney v. Wells*, 10 *Cbnn.* 104, was entirely repudiated, and the rule declared to be, that a lien may exist although there is a special contract. The mere fact, therefore, that there is a special contract, will not destroy the right of lien, unless there is some provision in it inconsistent with such right. An agreement which stipulates for payment in a

particular manner, and out of a particular fund, might be held inconsistent with the right of lien.

§ 700. So, also, liens may be created by *usage*. These repose upon an implied contract. The usage out of which they grow is either the common usage of trade, or that of the parties themselves in their previous dealings with each other. An attorney or solicitor has a lien for the general balance of his account arising out of his professional business, and this lien attaches, not only to all moneys he may have collected for his client, but also to all papers of his, which he may have in possession. *Stevenson v. Blakelock*, 1 *M. & S.* 535. Another instance is presented in forwarding merchants, who have made advances for charges on goods consigned to them for transportation and delivery to the ultimate consignee or owner. Advances so made give them a lien upon the goods, and the right to recover against a third person to whom the carrier has wrongfully delivered them. *Fitzhugh v. Wiman*, 5 *Seld.* 559. So also bankers, having advanced money to customers, have a lien upon all securities belonging to such customers, that come into their hands, for their general balance. But where a security is pledged for a specific sum, they cannot apply that to a general balance. The rule is, that where money is advanced by them to a customer upon general account, they have a lien for the amount of any balance, upon all securities in their possession, belonging to such customer; but if the banker make an advance upon the specific security of any particular bill, he thereby elects to abandon his general lien, and to resort to that security alone, and therefore cannot be justified in retaining any other securities to provide for the possible event of that one bill being dishonored. *Bosanquet v. Dudman*, 1 *Stark.* 1. *Bank of Metropolis v. New England Bank*, 6 *How.* 212. The law, however, in relation to some instances of this species of lien, cannot be considered as entirely settled, whether it is to depend upon general or special usage and custom; as, in regard to wharfingers, a

court has remarked that there may be a usage in one place varying from that which prevails in another. *Holderness v. Collinson*, 7 B. & C. 212. In many cases, therefore, a party who seeks to hold goods for a general balance, should be prepared to prove a special usage to that effect, applicable to his case. But this has no application to agents or factors, whose lien for a general balance rests upon general custom. But such agent or factor cannot enforce a lien for debts which accrued before his character, as such, commenced. The lien of the common carrier is *particular* or *special*, upon the goods he carries for their carriage. It has been of late years a good deal discussed whether they have not also, by the usage of trade, a *general lien*, or a lien for the general balance of their account against the owner. The enforcement of their special lien, in all cases, would leave no occasion for the exercise of a general lien. It is generally considered, that to entitle himself to a general lien, he must prove a usage, so general, and prevailing to such an extent, as that all parties contracting may be supposed to know it, and to contract in reference to it, and then it may fairly be said to form a part of the contract.

§ 701. A lien cannot be claimed to secure the payment of unliquidated damages, arising from the breach of a contract; and hence when the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods, but for so much also in addition as the ship would have carried, for which he had before stipulated to pay freight according to the different rates for three descriptions of goods; it was held that the ship owner had no lien upon the goods actually on board for the amount of *dead freight*, or, in other words, for the compensation in damages, to which he was entitled for the freighter's breach of contract in not putting a full lading on board, the same being unliquidated. *Philip v. Rodie*, 15 East. 547.

§ 702. The debt in reference to which the lien is claimed must be due to such claimant in his own right, and not as



the agent or representative of another. The master of a ship has no lien upon it for money expended in the payment of demands for repairs, either at home or abroad. But he may hypothecate the ship for such repairs, in the course of a foreign voyage, and thus give a lien to another, although he cannot, by payment, transfer it to himself.

## QUESTIONS.

How many kinds of lien? What are they? What rights given by each? What characteristics of the *particular* or *special* lien? What of the *general*? To whom does the latter belong? What classes of persons are compelled to receive goods? What does the law give them in the way of compensation? What is the rule where a party has bestowed labor and skill upon an article, and changed its properties and character? What the difference, in this respect, between an innkeeper and a livery stable keeper? What are the two principles upon which the common law right of lien rests? What are the rights of an innkeeper and a common carrier to retain property in their possession, as against the owner, which they have received and kept and carried for a thief? What is the reason of the difference of the rule as between the two? What is essential to a lien in favor of vendor or bailee? What effect has suspension of payment? What the giving of credit or taking a note on time? What result after term of credit expires? What kind of lien has the factor or agent? What does this cover? How far can this lien be specifically exercised? Does it cover the whole property, or only a part? What other sources of lien besides the common law? What can establish it by agreement of parties? How established by notice? What illustration? What effect has special contract in destroying lien? What kind of special contract would have that effect? How is lien created by usage? On what does it repose? What lien has an attorney and solicitor, and on what, and for what? What lien have bankers, and on what, and for what? How, where security is pledged for special sum? How does that affect general balance? What the general rule stated? What is the safe course for parties claiming to hold for general balance to pursue? What is the lien of the common carrier? What must he do to entitle himself to a general lien? Can lien be claimed to secure unliquidated damages arising from breach of contract? What illustration? To whom must debt be due when lien is claimed? Does master of a ship have lien for repairs? How can he give lien for such repairs to another?

## PART III.

## HOW LIEN MAY BE LOST.

§ 703. The general principle here is, that the lien ceases when the possession is voluntarily relinquished. As the exercise of the right depends on the possession, it follows that any voluntary surrender destroys the right. The surrender, however, must be voluntary and free from fraud, and hence where a common carrier was induced to deliver goods to the consignee, by a false and fraudulent promise made by the latter, that he would pay the freight as soon as the goods were received, and then refused to do so; it was held that he might recover them of the consignee by action of replevin. *Bigelow v. Heaton*, 6 Hill, 43. But any change of the character in which the party claiming holds them, if voluntarily made, results in the loss of the right. Thus a party having a lien on goods, causes them to be taken in execution at his own suit, and purchases them in on the sale. In such case, although the goods may never have left the premises, yet the nature of the possession, and the character of his claim, are so altered by this voluntary act, that his former right of lien is gone. *Jacobs v. Latour*, 5 Bingh. 130. Having, in such case, voluntarily destroyed his right of lien, he would be powerless in protecting the goods against a lien acquired by another which was prior to his own execution, but subsequent to his own original right.

§ 704. Where a right of lien exists, and is intended to be relied upon by the party owning it, he should distinctly assert it, whenever he intends to rely upon it. If, when the goods are demanded of him, he claims to retain them on some other ground, never mentioning his lien, he is considered as having waived it, and the owner of the goods may sue him and recover, without having first tendered to him the amount of his lien. *Saltus v. Everett*, 20 Wend. 267. If, however, there be a mere omission to assert his lien, that

would not probably amount to a waiver. Something is required beyond this, that is, the resting of his claim distinctly upon some other ground. *White v. Garner*, 2 *Bingh.* 23. There is, also, a good deal of question whether he is not bound to assert the precise lien, and if he claims one of too large a description, he may peril his entire right, although he may really possess one of a narrower character. *Saunderson v. Bell*, 2 *C. & M.* 304. But this principle is not uniformly acquiesced in. *Scarfe v. Morgan*, 4 *M. & W.* 270.

§ 705. There sometimes occurs a conflict between the lien which exists under a judgment, and the equitable rights which may previously have been acquired by a purchaser; as where he has previously made a contract to purchase the property which is subsequently bound by the judgment. In such a conflict the lien of the judgment must yield to the equitable rights of the purchaser, and the docketing of it is held to be no notice to him, nor does it invalidate his subsequent payments on the contract to the judgment debtor, made in good faith, and without actual notice of the judgment. *Meyer v. Hinman*, 3 *Kern.* 186. But the rule is different where an equitable lien is agreed to be given to secure an antecedent indebtedness; as where A is the holder of a mortgage, and the premises being about to be sold under his decree of foreclosure, he agrees with his creditor B to execute to him a mortgage on the land within ten days after he should so acquire the title, and the agreement thus made was carried into execution. But another creditor of A had obtained and docketed a judgment against him before the agreement was made. The latter was adjudged to have the prior lien. *Dwight v. Newell*, 3 *Comst.* 185.

§ 706. A vendor of real estate has an equitable lien for the purchase-money upon the property sold. The limitation of that lien is that it only exists when he has no other security. The taking of any security from the purchaser annihilates it. Even when such vendor takes security from a third person for the purchase-money, the equitable lien is

gone. *Vail v. Foster*, 4 *Comst.* 312. This principle has a more extended application, and embraces all cases where security is taken for a debt, such security being payable at a distant day. The lien is inevitably gone. *Small v. Moats*, 9 *Bingh.* 574. A question has arisen whether the assignee of a bond and mortgage, who holds the same as security for a loan, can have his lien extinguished by a settlement between the mortgagor and mortgagee, in good faith on the part of the latter, who executes to the former a discharge of the bond and mortgage. The principle settled is, that the land so conveyed continues subject to the mortgage in the hands of the assignee, that the non-production of the bond and mortgage on the settlement, should have been deemed, by the mortgagee, a circumstance sufficiently suspicious to put the mortgagor upon inquiry, and thus to charge him with notice of the actual state of the case, and consequently of the rights of the assignee. *Brown v. Blydenburgh*, 3 *Seld.* 140.

§ 707. A question whether a lien exists or not, may arise in a case where goods are sold to be paid for on delivery, by notes which are then to be delivered to the purchaser. But the goods are delivered without the notes being either given or demanded. This is held to be presumptively a waiver of all right to the notes, and of all lien upon the goods, a complete title vesting in the purchaser. And although, as between the vendor and vendee, it is competent to show an intention that the delivery should not be considered complete until performance of the condition, yet the burden of proof, in such case, is on the vendor, and a *bona fide* purchaser from the vendee, after actual delivery of the property, will hold it free and discharged from all lien or conditional sale. *Smith v. Lynes*, 1 *Seld.* 41.

§ 708. A lien is a species of property delicate and of difficult preservation. The possessor must exercise extreme care, or it will slip from his grasp. If a debt is already secured by a lien upon property, and the parties come to a

new arrangement with each other, agreeing that the debt shall be paid in a particular manner, the lien is gone. But it will continue to exist although there may be a right of set-off, upon the other side, to an amount equal to the debt secured by the lien ; because, in such case, the parties are viewed only as having mutual claims on each other, and this ought not to affect any securities which either may have on his claim against the other. *Pinnock v. Harrison*, 3 M. & W. 532.

§ 709. A lien is always totally inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed ; and hence where a solicitor took the notes of an executor of his employer, payable in three years, it was held, that by necessary implication, he agreed to give up the papers, and to rely upon the security. *Raith v. Mitchel*, 4 Campb. 146. And so no right of lien can exist in favor of the owner of the ship, when it appears by the terms of the charter-party that he had trusted to the personal responsibility of the merchant, by fixing on a specific time of payment either before or after delivery. And in reference to the credit given, it is of no consequence as to its effect upon the lien, whether it is secured by agreement, or arises out of the usage of trade ; as in a case where goods were landed upon a wharf in October, and by well-established usage, wharfage was not payable until Christmas. It was held there could be no lien. *Crawthay v. Humfray*, 4 B. & Ald. 50.

§ 710. The lien, when all its conditions are complete, will continue in force until the debtor, by complying with the terms of his contract, pays or tenders the debt, and thus releases the property ; or until the holder of the lien voluntarily and utterly resigns the possession of the property, and all right of further detention. It sometimes becomes necessary to determine how far a man may go without losing his lien. A mere marking and setting aside of particular goods

for a purchaser, will not destroy it, if he still retains his power over them. The retaining and storing them in his own store-house, will not deprive him of the right, although the vendee pay the rent for their storage. The mere giving a delivery order in such case, will not destroy the right. But if the goods are stored in the warehouse of a third person, and an absolute delivery order is given by the vendor which is presented to, and accepted by, such third person, the lien will be terminated. But if such delivery order be conditional, the acceptance of it by the third person would not be sufficient until performance of the condition. The true test of the existence of the right of lien is the continuance of the actual possession of the vendor. He may have performed acts which amount to a constructive delivery, so as to pass the title, or to avoid the statute of frauds, and still his lien may remain. As the lien imparts no right of property, but only that of possession and detainer, it is entirely competent to perform such a delivery as will be sufficient to pass the title, and yet leave behind such an amount of possession as will continue the right of lien. The perfect consistency of that delivery which transfers the title,<sup>a</sup> and that possession which secures the lien, may be seen in a case like this. There being an entire contract of sale, a portion of the goods are delivered under it. The effect of that is to transfer the title in the whole to the vendee. But such part delivery will not prevent the vendor from retaining his lien upon what remains with him for the entire price of the whole. The case, however, would be different, if the goods were in the warehouse of a third person and upon a general order given by the vendor, a part delivery should be made, with no intention of distinguishing between such part and the remainder. The lien would then be gone.

§ 711. It is possible for a lien to exist without a personal actual possession. The goods may be in the hands of a third person, and by the terms of the contract, the vendee is not entitled to take them until he has complied with certain

provisions, or performed certain acts ; as where A bought a certain quantity of wool of B, and removed it to C's warehouse, but which was hired by A, and, by the agreement, the wool was not to be removed by A until the price was paid by him. B was adjudged to retain his lien. *Dodsley v. Varley*, 12 *Adolph. & Ell.* 632. There may be a voluntary surrender of the possession for a limited time, and a special purpose, with no intention of ultimately giving up the possession, without losing the lien ; as where the property sold is a horse, which is taken for a limited time on trial, the agreement being that on delivery there shall be payment. The lien, in such case, is not lost.

## QUESTIONS.

What is the general principle as to the cessation of lien ? How must the surrender be to destroy the right ? How is it when carrier is induced to make surrender by fraudulent representations ? How in case of change of character in which party holds goods ? What instance in illustration ? What should party claiming right of lien distinctly do when he means to avail himself of it ? Suppose, when demanded, he claims to retain them on some other ground ? What would be the effect of mere omission to assert it ? What might be effect of asserting too large a description of lien ? Which is the superior, the lien under a judgment, or the equitable rights to the property which may have previously been acquired by a purchaser ? How, where equitable lien is agreed to be given to secure antecedent indebtedness, and judgment is docketed prior to agreement ? What will destroy the equitable lien of the vendor of real estate ? What will always be the effect of taking security for a debt payable at a distant day ? Can assignee of bond and mortgage, as security for loan, have his lien destroyed by mortgagee discharging the mortgage ? Where notes are to be given as security on purchase, but are not so, what is the effect of transfer of title ? What, in such case, are the rights of *bona fide* purchaser from vendee ? What if debt be secured by lien, and parties come to a new arrangement with each other ? How is it affected by a right of set off ? How are parties in such case viewed ? What is a lien always inconsistent with ? When can it only subsist ? What illustration ? When does no right of lien exist in favor of the owner of a ship ? Is there any difference whether the credit result from contract or custom ? How long will the lien, when complete, continue ? What will destroy it ? How does marking

and setting aside affect the lien? How, retaining them in storehouse? How the giving of delivery order? What will destroy it, if goods are stored in storehouse of third person? What results, if delivery order be conditional? What is the true test of the existence of lien? May owner of it give title by constructive delivery and yet retain right of lien? What case illustrates this? What is mentioned that would give a different result? Is it possible for a lien to exist without a personal actual possession? How may this be? What case in illustration? How may voluntary surrender be made and yet lien be preserved?

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## CHAPTER II.

### STOPPAGE IN TRANSITU.

#### PART I.

##### WHAT IT IS. ITS ORIGIN, AND WHO MAY EXERCISE IT.

§ 712. This is a right peculiar in its character, and the exercise of it depends upon several conditions, all of which must concur to give it any validity. It is a right which the law gives to the vendor, to repossess himself of goods which he has once sold to the vendee. The right to repossess, implies that they are not in the actual possession of the vendor. If they were, it would not be a right of stoppage *in transitu*, but one of lien. The exercise of the right is subject to the following conditions:

1. The price of the goods sold must remain unpaid.
2. The goods must be *in transit*, in the hands of a common carrier, or of some middle man, in their passage from the vendor to the vendee.
3. The insolvency of the vendee.

§ 713. This right is generally considered as deriving its origin from equity. It is equity giving an extension to the right of lien. It cannot be said to be of legal derivation, because it is in direct conflict with all the legal principles



applicable to the contract of sale. It is a right growing immediately out of the credit system of transacting business. That system led to the making of sales on credit, thus subjecting the vendor to the possible loss of his goods sold, on account of the insolvency of the vendee. It seemed inequitable that the vendor, with the full belief of the vendee's solvency, should be permitted to sell him goods, only to go into the hands of his creditors, to pay their debts as far as they would go. Hence the principle derived from equity, and engrafted into the law, that if the vendor could, by any effort he could make, reach and repossess himself of them before they had actually gone into the hands of the vendee or his assignees, he might do so, and hold them for whatever ultimate disposition might be made of them.

§ 714. The exercise of this right, as a general rule, is confined to a vendor or consignor, to whom the vendee is liable for the price. It may be, however, the immediate, and not the ultimate vendor. Thus where A, being abroad, receives orders which are sent to him, and procures goods answering to the order upon his own credit, so that he is himself liable for them to the vendor. He transmits them to the orderer, charging a commission. He is held entitled to stop them *in transitu*, because, so far as the person ordering them is concerned, he is the sole vendor. *Feise v. Wray*, 3 *East*. 93. So, also, a person sending goods to be sold on the joint account of himself and his consignee, has a right of stoppage. But the party seeking to exercise the right must stand in the relation of vendor, and hence where a person is a mere surety for the payment of the price of the goods sold, he is not entitled to stop them *in transitu*, because he is under no primary liability to pay the price. As to what may be considered subject to this right of stoppage, it extends to all kinds of goods, and even money when it is remitted on a particular account, and for a special purpose. But when the remittance is general, and made in part or whole payment of a debt, it cannot be stopped *in*

*transitu*. It has generally been considered as confined to cases of the insolvency of the vendee. But in one case the discovery of the falseness of representations was held sufficient to give the right. *Fitzsimmons v. Joslin*, 21 Verm. 129.

### QUESTIONS.

Upon what depends the exercise of the right of stoppage *in transitu*? What does the law give to the vendor by it? What does the right to reposses simply? What are the conditions to which the exercise of the right is subject? What is this right derived from? What does equity do in giving it? Why can it not be said to be of legal derivation? What does the right grow out of? What considerations give rise to the equitable principle? To whom, as a general rule, is the exercise of this right confined? May it be the immediate, and not the ultimate, vendor? What illustration? How is it with a person sending goods to be sold on joint account of himself and his consignee? What relation must party sustain to exercise the right? How is it with a surety for the payment of the price of the goods sold? Why cannot he stop *in transitu*? In what case may money be stopped *in transitu*? In what may it not be?

### PART II.

#### WHEN, AND UNDER WHAT CIRCUMSTANCES, THE RIGHT MAY BE EXERCISED, AND WHEN LOST.

§ 715. One of the necessary conditions giving this right to the vendor, is, that the property upon which it is to be exercised, be *in transit*, in the hands of the common carrier, or of some middle man, who is possessed of it for the purpose of transmission to the vendee or consignee. If still in the possession of the vendor or consignor, he may exercise upon it his right of lien. If it has actually gone into the possession, or under the control, of the vendee or consignee, it has then become mingled with his other property, and has gone beyond the reach of the party selling or consigning.

§ 716. One of the most difficult points of inquiry is, what kind of delivery to the vendee or consignee is sufficient

to destroy this right? Or what ends the transit? Among the instances of delivery which have been adjudged sufficient to take away this right, are the following. "A delivery of the key of the vendor's warehouse to the purchaser; paying the vendor rent for the goods left in his warehouse; lodging an order from the vendor for delivery with the keeper of the warehouse; delivering to the vendee a bill of parcels, with an order on the storekeeper for the delivery of the goods; demanding and marking the goods by the agent of the vendee, at the inn where they had arrived at the end of the journey; suffering the goods to be marked and re-sold, and marked again by the under-purchaser." 2 *Kent's Comm.* 546. There is no doubt but that when the goods come to the actual possession of the vendee that is sufficient; and Lord Kenyon once said that the goods must come to the corporal touch of the consignee; but he afterwards regretted the use of that expression, and it is now well settled that a constructive possession may be sufficient. This departure from the actual into the constructive, has led to the creation of much doubt and difficulty in determining many cases that have arisen.

§ 717. What constitutes *constructive* delivery, in any given case, is not so easily arrived at. It partakes more of the nature of a *fiction* than a *fact*, and is attempted to be so moulded as to serve the purposes of equity. It is generally understood as occurring where the property is placed within the control of the vendee. The goods must have ceased to be *in transit*, and must have come into the hands of the vendee, or some person acting for him. They may arrive at the end of their transit, and go into the possession of a wharfinger, and yet the vendee may decline receiving them, and the vendor still be at liberty to exercise this right. As where A ordered goods of B in London, which were sent and delivered to C, a wharfinger, on A's account, and freight and charges were all paid. But A, becoming insolvent, declined receiving the goods. It was held that the right was

not gone from B. *Mills v. Ball*, 2 Bos. & Pull. 457. It is generally understood that the vendee, finding himself insolvent, and unwilling that the goods just purchased should go to other creditors, may, before delivery, rescind the contract of sale with the assent of the vendor, so that the goods can be retaken by the latter. But this is a right that an insolvent vendee can only exercise while the goods are *in transit*, and previous to committing any act of bankruptcy, and it will be too late after actual delivery, and mingling the goods with his other property.

§ 718. It is a clear deduction from all the cases, that the goods are always to be deemed *in transit* while they are in the possession of the carrier as carrier, even although he may have been appointed by the vendee; and they are also so considered while they are in any place of deposit connected with their transmission and delivery, and until their arrival at the actual or constructive possession of the vendee. Thus it is held that "goods may be stopped so long as the transit continues, whether by land or water, from the consignor to the consignee, and whether they are in the hands of the carrier, a warehousekeeper, wharfinger, or any other middle man connected with the transportation. The transit ends when the goods have reached the place of delivery, and the consignee has exercised some act of ownership over them." *Motham v. Heyer*, 1 Denio, 487. In the same case it was held, that where the consignee received the bill of lading, paid the freight, and entered the goods at the custom-house, the duties, however, remaining unpaid, and the consignee became insolvent, the *transitus* was ended, and the right of stoppage gone. In *Northey v. Field*, 2 Esp. 613, the goods were lodged in a public warehouse, the duties being unpaid, but the freight seems not to have been paid, nor the goods entered in the name of the consignee. Held that the consignor still retained his right. So, also, in a case where the vendee had even paid the freight. *Donath v. Broomhead*, 7 Barr, 301. So the right is held to remain while a vessel

is performing quarantine at the port of delivery. *Holst v. Pownal*, 1 *Esp.* 240.

§ 719. It seems admitted that the *transitus* is completely at an end when the goods arrive at an agent's who is to keep them until he receives the further orders of the vendee. But by a recent case the right is not terminated by the goods coming to the hands of a shipping agent appointed by the vendee, where they are to await further orders as regards the time and mode of shipment to the vendee. The rule there established is, that the transit continues until the goods come into the possession of the vendee, or of some agent authorized to act in respect to the disposition of them *otherwise than by forwarding them to the vendee*. *Harris v. Pratt*, 17 *New York Rep.* 249. This case is in affirmance of the general principle laid down by Chancellor Kent—"that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for *safe custody, or for disposal on the part of the vendee*, and the middle man is by the agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. So, a complete delivery of part of an entire parcel or cargo, with intention to take the whole, terminates the *transitus*, and the vendor cannot stop the remainder." 2 *Kent's Comm.* 545.

§ 720. Goods are generally considered in the constructive possession of the vendee, when they have reached the place, to which, by the terms of the contract, they were originally to be carried. Thus where goods were purchased at London by a vendee residing at Manchester, to be forwarded to his agents at Hull, for the purpose of being shipped by them to Hamburgh, their arrival at Hull and delivery to the vendee's agent there, was held to terminate the transit. *Dixon v. Baldwin*, 5 *East.* 175. Where goods are placed

on board a vessel to be therein transmitted directly to the vendee, the delivery is not completed by the placing on board, because a subsequent and actual possession is provided by the bill of lading. But if such goods are to be transported directly to a foreign market, away from the vendee, the delivery is then considered as complete, so as to destroy the right of stoppage, no other or better delivery than that on board the ship being contemplated. The relations sustained at the time by the carrier are important in determining the question of termination of transit. So long as he continues in performance of the contract he makes with the vendor for their carriage, there remains the right of stoppage *in transitu*. But if this contract is performed, and he enters into a subsequent one, agreeing to hold the goods as the special agent or bailee for the vendee, for the purpose of custody on his account, the right of stoppage will be lost.

§ 721. Another necessary condition attached to the exercise of this right, is the insolvency of the vendee. The term is here used to mean an inability to pay his debts. But the question may arise as to what shall be deemed sufficient evidence of that condition to justify the assertion of this right by the vendor. It has been generally understood that any well-founded or probable information of such pecuniary embarrassment, on the part of the vendee, as to prevent him from honoring his drafts, or meeting the demands of his creditors, is a sufficient insolvency to justify the vendor in exercising the right. The vendor, however, must always assume the responsibility of his own act, and if he stop the goods wrongfully, the vendee may not only retain them, but must also be indemnified for all the damages and expenses growing out of the stoppage.

§ 722. Another inquiry which it becomes important to make, refers to the acts of the vendee which have a bearing upon the exercise of this right. It has been made a matter of some question whether the vendor could not avail him-

self of his right at any time before the goods had reached their place of destination ; or whether the vendee possessed the right to intercept them on their way, and by taking possession in any part of their transit, deprive the vendor from subsequently exercising the right. Since the case of *Mills v. Ball*, 2 Bos. & Pull. 461, and *Oppenheim v. Russell*, 3 Bos. & Pull. 42, it has been generally conceded that the vendee may intercept the goods in any part of their transit, and by taking possession of them as owner, the delivery becomes complete, and the right of stoppage gone. But if a vendee merely takes samples of the goods, while they yet remain in the hands of the carrier, and no obstacle prevents their full delivery, it will not be sufficient to end the transit. But if obstacles prevent a full delivery, and samples are taken as the best mode of taking possession, the right of stoppage will be gone ; as where the vendee of several hogsheads of sugar upon receiving notice of their arrival, took samples from them, and desired the carrier to let them remain in his warehouse until he should receive further directions, and soon after became bankrupt, it was held that the transit was at an end. *Foster v. Trampton*, 6 Barn. & Cress. 107.

§ 723. A delivery order, absolute in its terms, given to the vendee, when the goods are in the warehouse of a third person, will not destroy the right while it remains unaccepted by the warehouseman ; but on its acceptance, and the latter becoming the bailee or agent of the vendee, the right is gone. So a complete delivery by the latter, of part of the goods sold under an entire contract, in compliance with a general order by the vendor, will divest the vendor of the right of stoppage. *Hammond v. Anderson*, 1 Bos. & Pull. N. R. 69.

§ 724. It may become very important to know what power a vendee or consignee possesses, by means of a bill of lading, to terminate the vendor's right of stoppage, while the goods are yet at sea ; and there seems now no doubt but

that a consignee by his indorsement of the bill of lading to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interest, will pass the entire property divested of all right of stoppage. *Conard v. The Atlantic Insurance Company*, 1 *Peters*, 386. In accordance with well-settled principles of equity, a mere deposit of the bill of lading, without indorsement, will create a lien on the cargo to the extent of the money advanced, which will be superior to the consignor's right of stoppage. But the right of the vendor is superior to any lien that may be acquired by any creditor of the vendee, because it is the elder lien, and cannot be superseded by any one of this character; and hence when the goods were levied upon by execution at the suit of a creditor of the purchaser, before the *transitus* was ended, it was held inoperative as against the right of the vendor. *Oppenheim v. Russell*, 3 *Bos. & Pull.* 42.

#### QUESTIONS.

What is one of the necessary conditions giving this right to the vendor? What effect if still in possession of the vendor, or if gone into possession of vendee? What instances of delivery have been adjudged sufficient to take away this right? What result when goods come into actual possession of the vendee? What else besides actual possession is sufficient? What is the nature of constructive delivery? When does it occur? Suppose goods have arrived at the end of their transit, and have gone into the hands of a wharfinger, and vendee declines receiving them, what is vendor's right? What illustration? When can an insolvent vendee exercise the right of rescinding contract and returning the goods? When are goods always to be deemed in transit? Under what other circumstances are they so considered? How long may goods always be stopped? When does the transit end? What illustrations? When is the *transitus* completely at an end? What is the rule established in *Harris v. Pratt*? What the rule laid down by Chancellor Kent? When are goods considered in the constructive possession of the vendee? What illustration? How, when goods are placed on board a vessel to be transmitted directly to vendee? How, if they are to be transported directly to a foreign market away from vendee? How is it with the right so long as carrier continues in performance of his contract with the vendor? How, when this contract is performed, and he enters into



subsequent one with vendee? What other condition is necessary to the exercise of the right? What does term insolvency here mean? What is deemed sufficient evidence to justify vendor in exercising the right? Who must assume the responsibility of its exercise? What, if he take the goods wrongfully? What acts of the vendee may destroy this right? Has he a right by intercepting them *in transitu* to destroy the right? How, if he take samples while they are yet with the carrier? Under what circumstances, in such case, will there be, or not be, a delivery? What illustration? When is delivery order a good delivery? When not? When will part delivery destroy the right? How can right be destroyed while goods are at sea? When will deposit of bill of lading interfere with the right? And to what extent? How is it with liens acquired by creditors of vendee? Are such liens superior or inferior to the right? What illustration?

### PART III.

#### HOW EXERCISED, AND ITS EFFECT.

§ 725. The vendor or consignor, in order effectually to exercise this right, is under no necessity of making actual seizure of the goods while on their transit. All that is necessary is for him to give notice to the carrier, or middle man who has them in possession, and to claim them of him, while on their passage, or prior to delivery to the vendee. Thus where a quantity of wine was in the king's warehouse for sale, the duties remaining unpaid, the consignee became insolvent, and the consignor made claim to the property. Held this was a sufficient exercise of the right of stoppage *in transitu*. *Northey v. Field*, 2 *Esp.* 613. So a notice to the carrier to retain the goods for vendor, and not deliver them to the vendee, is sufficient, and if the carrier, notwithstanding the notice, subsequently delivers them, he will be liable. The carrier, however, will be entitled to his freight.

§ 726. The vendor must make his claim of, and give his notice to, the person having the immediate custody of the goods. If given to a principal, whose agent has them in custody, it must be given at such a time, and under such circumstances, that such principal, by the exercise of rea-

sonable diligence, may communicate it to his agent in time to prevent the delivery to the consignee.

§ 727. There has been some conflict of decision regarding the effect of the exercise of this right. The difficult point to determine has been whether the exercise of the right rescinded the sale, *Lord Abinger*, in *Wentworth v. Outhwaite*, 10 *M. & W.* 451, expressing the opinion that it had that effect, while the other Barons, *Parke*, *Alderson*, and *Rolfe*, were of a contrary opinion. It is now very generally conceded, *Rowley v. Bigelow*. 12 *Pick.* 313, *Stanton v. Eager*, 16 *Pick.* 474, and other cases establishing the position, that the resumption of the goods by the vendor had not the effect of rescinding the contract of sale, but only of restoring the vendor to the situation he occupied when he parted with the possession. It reinstates him in his right of lien. The vendee, or his assignees, will be entitled to the goods on payment or tender of the price, and so also will the vendor, although he has actually repossessed himself of the goods, be entitled to sue for the price, provided he have the goods ready to redeliver upon payment. Thus the right is found to resolve itself into a mere equitable lien, leaving the parties their rights and remedies under the contract still entire.

#### QUESTIONS.

Is actual seizure necessary to enforce this right? What is all that is necessary for the vendor to do? What illustration? Of whom must vendor make claim, and to whom give notice? What notice necessary when given to principal? What effect has the exercise of this right on the contract as to rescinding it? What are the vendee's and vendor's rights notwithstanding the exercise of the right? What then does it resolve itself into?



## CHAPTER III.

## DOMESTIC RELATIONS.

## PART I.

## INFANCY.

§ 728. An infant is a person under twenty-one years of age. The important legal inquiries are,

1. What acts an infant can do that are legally binding upon himself and his estate.

2. What acts are void or voidable, and how avoided or confirmed.

§ 729. An infant is bound by all contracts he may make for necessaries, and these include clothing, victuals, medical aid, and "good teaching or instruction, whereby he may profit himself afterwards." He is bound for these only so far as they are to him articles of necessity; and then only for their real value; so that it is the implied, and not the real contract, upon which the liability rests; and he will not be liable on a note given for necessaries, or for money borrowed to purchase them, although it may be actually applied to that purpose. The creditor, before trusting, is bound to inquire into his condition, and will not be entitled to recover if they are properly supplied by the infant's friends, or if he lives with his father or guardian, who exercises over him due care and protection. Necessaries for the infant's wife and children are considered necessaries for him.

§ 730. Infants are liable for damages suffered by others in consequence of their own tortious, wrongful, or fraudulent acts. They are liable for trespass, assault, constructive torts, trover, or wrongful conversion of property, and for fraudulently obtaining goods. Infancy affords no shelter

where property has been obtained possession of under pretence of legal purchase, and the claim that he was of age at the time; for although he may, by setting up his legal disability, avoid payment of the price, yet the owner may reclaim his goods, upon the ground that he has not parted with his title to them. *Fitts v. Hall*, 9 *N. Hamp.* 441.

§ 731. An infant may do many valid acts, such as, to convey real estate as a trustee, discharge a mortgage on payment, act as an executor, and, if a male, at fourteen, and, if a female, at twelve, may enter into a valid contract of marriage. But his contract should be executed, as he would not be liable upon an executory contract to marry, although an infant may hold an adult on such a promise. *Hunt v. Peake*, 5 *Cow.* 475. As a general rule, whatever the law binds an infant to do, will bind him if he does it voluntarily without any compulsory process. *The People v. Moores*, 4 *Den.* 518.

§ 732 Most of the acts of an infant relating to the transaction of business, are voidable only; and his attainment of majority vests him with the right of electing whether he will confirm or repudiate. The tendency has been to increase the list of voidable contracts; but the general rule is laid down to be, that the court pronounces those contracts void which are manifestly to the infant's prejudice; those good, as for necessities, which are to his benefit; and those voidable at his election, which are uncertain as to his prejudice or benefit.

§ 733. An infant may avoid his deeds, writings, and parol contracts, by his express dissent; or by plea or action. He may avoid, during infancy, a sale of chattels, and, by his guardian, bring an action to recover them back. But it seems that a sale of land cannot be avoided by him until he comes of age. *Roof v. Stafford*, 9 *Cow.* 626. *Bool v. Mix*, 17 *Wend.* 119. If the act be of such a character as to require confirmation after he comes of age in order to render it binding, his assent to it may be gathered from slight acts

and circumstances. Where a contract is voidable by an infant on his coming of age, he must give notice of disaffirmance in a reasonable time. *Holmes v. Blogg*, 8 *Taunt.* 35. This implies that if no dissent was given, all voidable contracts would become binding. But other authorities are to the effect that some acts of affirmance are necessary, after arriving at age, before a contract made in infancy can become binding. In the case of a contract considered void, the court required the infant, after arriving at age, to do some act of assent and ratification, or knowingly to receive some benefit from it. *Curtin v. Patton*, 11 *Serg. & Rawle*, 305. In all cases, much the safer course is for the infant, soon after he comes of age, to do some positive act in affirmance or disaffirmance of the contract. A sufficient lapse of time, however, in voidable contracts, will often imply assent; and hence, where a sale was made of infant's estate, and eighteen years were suffered to elapse after he came of age, without impeaching the conveyance, held, that although the sale was originally voidable, yet he had impliedly affirmed it. *Bostwick v. Atkins*, 3 *Comst.* 53.

### QUESTIONS.

Who is an infant? What legal inquiries arise in relation to him? What is an infant bound for? What do necessities include? How far is he bound for these? What is the creditor, before trusting, bound to inquire? When is he not entitled to recover? What is an infant's liability for damages? What acts are they liable for? To what does infancy afford no protection? What valid acts may an infant do? When is a contract of marriage valid? What is a general principle as to the validity of infant's contracts? What is the general character of most of an infant's business transactions? What has the tendency been? What is the general rule as to their contracts being void, voidable, and good? How may an infant avoid his deeds, writings, and parol contracts? When may he avoid a sale of chattels? When of land? What may his assent, when required, be gathered from? When a contract is voidable, what must infant do? What is the safer course for infant to pursue on coming of age? May a sufficient lapse of time imply assent? What instance in illustration?

## PART II.

## MARRIAGE.

§ 734. This relation may be entered into by all persons having the use of their understanding, and possessing sufficient discretion for the common affairs of life. All idiots, and imbeciles, and lunatics (except in their lucid intervals), are incompetent, as they are incapable of giving their assent. All marriages procured by force or fraud are also void, as the element of assent is wanting, so one made during such a state of intoxication as would take away the ability to contract. An erroneous, or even false, representation or suppression, would not be sufficient to avoid it, unless it went to the very substance of the contract. Any such representation in relation to qualities, condition, rank, fortune, character, would be insufficient, all those being matters open to general inquiry. The age of consent, borrowed by the English from the Roman law, is fourteen in the male, and twelve in the female. Marriage within that age is voidable by the party when he arrives at the age. And then it is only voidable at the infant's election. The other party, if of full age, has no power of avoidance. A fatal bar to the entering into this relation, is the having a former husband or wife living. A second marriage, under such circumstances, is void at common law.

§ 735. Questions of much difficulty arise as to the degrees of relationship, either by blood or affinity, within which marriages are prohibited. The canon and common law rank consanguinity and affinity together, although nature makes a wide difference between them, the former being blood relationship, and the latter merely the relation contracted by marriage between a husband and his wife's kindred, and a wife and her husband's kindred. Intermarriages between relations, either by blood or affinity in the lineal line, whether ascending or descending, are unlawful, as not only

being unnatural, but as leading to a confusion of rights and duties. In regard to collaterals, there is difficulty in fixing upon forbidden degrees. Some States adopt, by statute, degrees nearly resembling the Levitical, within which to declare marriages void. Marriages between brothers and sisters, although collateral, are forbidden by law equally as those in the lineal line. But beyond that, if any prohibition exist, it must be found in the statute, as it is not in the canon, or common law.

§ 736. The law views marriage as altogether in the nature of a civil contract, entered into between parties capable of contracting, and of entering into those relations. The consent of the parties themselves is all that is necessary to the validity of the marriage contract, that of parents or guardian not being required. Nor are any peculiar rites or ceremonies necessary to be performed, or the agency of any particular class of men required, to render a marriage binding. Nothing ecclesiastical is necessary to give it validity. No offices of a clergyman are required, nor even of a magistrate. There is no necessity of acknowledgment before witnesses, as the marriage may be inferred from continual cohabitation, and reputation as husband and wife established with their knowledge and assent. In some of the States, certain things, such as the publication of bans, are required by statute, but in others the common law is left to control.

§ 737. A point of some difficulty has been presented regarding the validity of a marriage by the laws of the State where the parties reside, the same having been solemnized in another State, where the legal requisitions are of a different character. Parties reside in Massachusetts. They desire to evade the statute requisitions of that State relating to marriage, and succeed in doing so, by going to New York, and getting married in conformity with the laws of the latter State. They then return to Massachusetts, and claim that a marriage between its own citizens, solemnized in fraud of its laws shall be nevertheless deemed valid, and the rights

secured under it protected by those laws. After a good deal of discussion, both in England and in this country, it is finally settled that such a right does exist; and that a marriage valid by the laws of the place where it is made, is to be considered as valid everywhere, even by the laws of the State of which it was itself an evasion. This is contrary to the general principles of law applicable to other contracts, and rests upon grounds of policy peculiar to itself; these grounds being principally the prevention of the disastrous consequences which would ensue from holding such marriages to be void. *Medway v. Needham*, 16 *Mass.* 157. *Compton v. Bearcroft*, 2 *Hagg. Consist. Rep.* 443.

### QUESTIONS.

Who may enter into the relation of marriage? Who are incompetent, and why? How as to marriages procured by force or fraud? How during a state of intoxication? What effect have misrepresentations as to qualities, condition, rank, fortune, or character? What is the age of consent? How with marriage within that age? At whose election is it voidable? How is it with party of full age? What is a fatal bar to this relation? What is the difference between consanguinity and affinity? How does the canon and common law rank them? How are intermarriages between relations by blood or affinity in the lineal line? How in the collateral line as to brothers and sisters? How as to prohibition beyond that degree? How does the law view marriage? What is all that is necessary? Is consent of parents or guardians necessary? Are any peculiar rites and ceremonies necessary to render it valid? Are the offices of clergymen or magistrates required for such purpose? How may marriage be inferred? How far are marriages valid that are solemnized in accordance with the law of the place in which they occur? Are they valid by the laws of the State of which they are an evasion? Is this the same principle that prevails in other contracts? What causes the difference?

### PART III.

#### HUSBAND AND WIFE.

§ 738. The legal principles applicable to this relation, and the rights and duties reciprocally flowing from it, are of vast importance as they pervade all the domestic, and



many of the business concerns of life. The one great principle lying at the foundation of this relation, and from which all the others are more or less directly derived, consists in the merger of the wife in the husband, and the entire suspension, during its continuance, of the legal existence of the former. It is true that equity, for certain purposes, keeps alive the capacity of the wife, but the common law gives her no original power or authority.

§ 739. Immediately upon marriage, the husband becomes seized of a life estate in, and entitled to, all the rents and profits of her real estate during their joint lives; and if, during the marriage union, she have issue by him capable of inheriting, he then becomes entitled, as tenant by the courtesy, to all such rents and profits during his natural life. All her personal property and chattels real vest in, and become the property of, the husband. All her things in possession become as much his property, by the common law, upon the fact of marriage, as if he had inherited, or purchased and paid for them.

§ 740. As to the wife's *choses in action*, or debts due her at the time of the marriage on bond, note, account, or otherwise, they may be said to vest only conditionally in the husband; that is, subject to his reduction of them to possession. If due, and recoverable in a court of law, he may sue and recover; and having worked a transfer of them from *action* into *possession*, they are then as fully his own property as if they had been originally *choses in possession*. But if he dies, the wife surviving him, and has not reduced them to possession, they revert to her, and she becomes repossessed of them, and restored to the same right of which the marriage deprived her. If he survives her, her *choses in action* still remaining, and not reduced to possession, are recoverable by him to his own use, by acting as her administrator. The latter, however, are regarded as assets of her's in his hands, and will render him liable, as far as they go, to the payment of her debts contracted before marriage.

If he dies before having reduced them to possession, they go to his personal representatives, but charged still with the duty of being applied to the payment of her debts before marriage.

§ 741. Whatever of the wife's *choses in action* the husband can sue for and recover in a court of law, he may reduce to possession, and if he chooses squander and dissipate, leaving her and her children without any means of support. But if he is obliged to invoke the aid of a court of equity to gain possession or control of her property, as if it be held in trust for her by others, or even if it be a legacy left to her, or a distributive share in an estate, such court of equity will first require him to make, out of the property, a suitable provision for her maintenance, before he can be allowed to take possession.

§ 742. The liabilities of the husband are also peculiar. He is liable, during her life, to discharge all her debts and obligations at the time of the marriage, whether he received with her any property or not. This has been complained of as a hardship, but as a compensation, her death releases him entirely from all such obligations, although he may have received with her more than ten times sufficient to pay all her debts, and they all remain unpaid.

§ 743. His obligations are to provide her with necessaries suitable to her situation and his condition in life, and she may contract debts for that purpose which he will be liable to pay. But he is chargeable for nothing beyond; and a merchant lending money to the wife, or furnishing and charging goods to her, could not compel the husband to pay. And where a reasonable allowance is made by the husband to the merchant's knowledge, he can recover for nothing beyond. The husband is liable for necessaries furnished the wife if he abandons, or lives separate from her, having made no provision for her maintenance; but not in case of her elopement, although it be not with an adulterer. Hence all persons giving a credit, even for necessaries, to a

married woman, living separate from her husband, should make inquiries into the real circumstances of the case. If, after having eloped, the wife repents and returns, the husband will be bound for her necessities, unless she have committed adultery. *McKutchen v. McGahay*, 11 *John.* 281. *Govier v. Hancock*, 6 *T. R.* 603. If the husband, without just cause, turn away his wife, even although he prohibit the merchant from furnishing her with necessities, on his credit, he will nevertheless be liable. *Houlston v. Smyth*, 3 *Bingh.* 127. If, during the continuance of the marriage relation, the wife commit tortious or fraudulent acts in his company, or by his order, he alone is liable; if not so committed, but they are her separate acts, they are then jointly liable.

§ 744. Many cases have arisen testing the wife's ability to contract, and render herself liable at law; and also her ability to acquire property and rights, while living separate from her husband either under a decree of the court, or by an arrangement voluntarily entered into. The rule is well settled that she possesses this ability when the husband, being a foreigner, has abandoned her, and resides abroad. It is thought the rule may, also, come to be extended to embrace cases where the husband is not a foreigner, as there seems to be no real foundation for the distinction. The rule is the same where the husband is *civiliter mortuus*, civilly dead. It is not clearly settled whether she possesses this ability when she is living apart from her husband under a decree of the court divorcing her *a mensa et thoro*, or a limited divorce; but in such case the jurisprudence of Massachusetts concedes to her the ability. *Dean v. Richmond*, 5 *Pick.* 461. A great contest has been carried on in the English courts regarding the possession of this ability by the wife where there was a voluntary separation, and the wife was living apart from her husband under a deed of settlement voluntarily executed. The Court of King's Bench, under the lead of *Lord Mansfield*, in *Corbett v. Poelnitz*, 1 *Term. Rep.* 5, held that under such circumstances she possessed the

ability, being remitted to her rights as a *feme sole* or single woman. The doctrine, however, was questioned in several cases, and finally distinctly overruled as an innovation upon the common law in *Marshall v. Rutton*, 8 *Term. Rep.* 545. The doctrine, as now understood both in England and in this country, is, that such circumstances cannot restore the ability.

§ 745. But while at common law the wife is so effectually precluded from acquiring any property or rights during the husband's life-time, the court of equity, deriving its principles from the civil law, offers her its protection, and, under the forms which give it jurisdiction, afford her ample security. These forms, or one class of them, is the creation of trusts. Property is given to a trustee in trust for the wife, under such regulations as the creator of the trust thinks proper to impose, and all such trusts the court of equity will protect and enforce, refusing to the husband and his creditor any control or right over such property. The husband himself may be the trustee, but his acts in reference to it are under the direction of the court. The property may come from him, and any stipulation he may enter into before marriage, although with her individually, without the intervention of a trustee, equity will, after marriage, compel him to perform. So gifts from him after marriage, equity will support as her separate property, provided they be not prejudicial to creditors. And in cases of gifts directly to the wife, without the intervention of trustees, equity will, on application, often appropriate them to her separate use, creating trusts, when necessary, for that purpose.

§ 746. The question here naturally arises as to the extent of power possessed by the wife over, or in regard to, such separate property. The rule in equity is very liberal. She is there regarded as *sole* or unmarried, and as possessing, in regard to her separate property, essentially the same rights as if her husband were dead. She may make contracts in relation to such property which may be enforced in equity.

The ground on which a creditor is held authorized to proceed against the separate estate of a married woman, for a debt which is not made a charge upon that estate, pursuant to some deed of settlement, is by showing, either that the debt was contracted for the benefit of her separate estate, or for her own benefit upon the credit of the separate estate. *Curtis v. Engel*, 2 *Sandf. Chan. Rep.* 287. But if such debt is properly incurred, equity makes no personal decree against her for its payment. It only applies to that purpose her property in the hands of her trustee. The decree is *in rem*, and charges her estate, and not herself.

§ 747. But although, during the continuance of the matrimonial state, debts of this character may accrue, and be thus enforceable, and even a debt contracted during that state, may be held as *prima facie* evidence of an appointment or appropriation of her separate estate to its payment; yet it is entirely different with debts of her's existing at the time of the marriage. In the latter case, all remedy against her separate property is suspended by the marriage. And hence where a woman married, owing debts at the time, and owning bank stock, which latter, with the consent of the husband, and without any fraud, was transferred to a trustee for her own separate use, it was held that in the absense of any act of her's, after the marriage, indicating an intention to charge this fund, the creditor could not, in equity, reach and appropriate it to the payment of his debt. *Vanderheyden v. Mallory*, 1 *Comst.* 452.

§ 748. The power of disposition, possessed by the wife, is not a matter of arbitrary exercise. It must be according to the mode prescribed by the instrument under which she claims the property. If the power of appointment is to be exercised by will, she cannot do it by deed, and so the reverse. At least this was the earlier doctrine, but in the jurisprudence of New York it is now settled in her highest court, that although a particular mode of disposition be pointed out in the instrument, yet that would not preclude

the wife from adopting any other mode of disposition, unless she was by the instrument itself specially restrained, in her power of disposition, to a particular mode. *Jaques v. The Methodist Episcopal Church*, 17 John. 548.

§ 749. A wife may, in equity, contract with her husband, after marriage, for transfers of property, provided it be done in good faith, and such contract will be enforced. She may unite with her husband in conveyances of real estate, or she may release separately her right of dower to his grantee; but any such conveyance or release will be inoperative to transfer title unless she make the proper acknowledgment before a commissioner. This mode is prescribed by statute, and is the only one by which she can legally divest herself of her real estate. If, during the marriage relation, she becomes a party to a deed containing covenants, they cannot be enforced against her after the death of her husband. *Fowler v. Shearer*, 7 Mass. 21.

§ 750. Although a married woman may, in equity, dispose of her separate estate, and create valid charges upon it, which may be enforced; yet in the State of New York and several other States, she is incapacitated by statute from making any last will and testament. She may, however, by the permission of her husband, make a disposition in the nature of a will, of personal property placed for her separate use in the hands of trustees. And so also by virtue of a power reserved prior to marriage, under an agreement with her intended husband, she may be enabled, at any time during the marriage relation, by executing the power, to make a disposition of her property in all respects similar to that made by a last will and testament; and if made in pursuance of such reserved power, equity will carry it into effect, although it be given to her husband, or to others, to the exclusion of her heirs at law.

§ 751. Ante-nuptial agreements made in contemplation and consideration of marriage are valid, and their specific performance will be enforced in equity. Marriage is itself

a valuable consideration to support such an agreement. So, also, settlements made after marriage, but in pursuance of an agreement entered into previous to it, will be enforced both as against creditors and purchasers. And a settlement made after marriage may be good, if made upon a valuable consideration, as upon receiving equitable property from the trustees of the wife. The amount of the consideration in such a case would be inquirable into, and to sustain it must bear a reasonable proportion in value to that of the property settled. Even voluntary settlements, made without any consideration, are good as against the party making them, but may be decreed void as against creditors existing at the time. They will be good, however, as to subsequent creditors, if made without any fraudulent intent. These settlements are good as between the parties, only on the condition that they contemplate the continuance of the marriage relation. Where they are made with a view to a separation, they come under a different principle. The law does not authorize a voluntary agreement for a separation between husband and wife. The wife, it is said, cannot make a valid agreement with the husband, for a separation in violation of the marriage contract, except under the sanction of courts of equity, and except in the cases where the conduct of the husband would have entitled her to a separation. *Rogers v. Rogers*, 4 *Paige*, 516.

§ 752. The husband and wife cannot be witnesses for or against each other in a civil suit. This is based upon public policy. They cannot be witnesses for each other, because they are one in interest; nor against each other, as it might disturb the marriage relation. Nor can they be witnesses against each other in criminal prosecutions, or criminal complaints, except that the wife may make affidavit against the husband in case of threatened, or apprehended, or actual violence. The declarations of the wife are evidence against the husband, wherever she is shown to be acting as his agent. While acting in such capacity, she may bind the

husband by her contract; and in those departments of his household which are under her control, a jury may infer her agency. The acquiescence of the husband with knowledge, would be sufficient evidence of authority. The husband is bound to maintain and protect the wife, and with that view the law gives him control over her person, and he may even put some restraints upon her liberty, if her conduct be such as to require it.

§ 753. The relations of husband and wife, thus briefly considered, are those only derived from the common law or equity. These are subject to be interfered with by legislation. The tendency of late years has been in the direction of emancipating the wife from the dominion of the common law, and of enabling her to own property, and to possess the rights incident to such ownership. The State of New York has effected a very complete emancipation. By the acts of 1848 and '49, she was vested with all the rights of a single woman as to the ownership of property that she might inherit, or which might descend to her by devise or bequest, or which might be given to her by any person other than her husband. By the act of 1859, her earnings, in like manner, are also made her's, so that now, in relation to property and its rights, she occupies quite an independent position.

#### QUESTIONS.

What is the one great principle lying at the foundation of the relation of husband and wife? What does equity do? What the common law? What occurs immediately upon marriage? What the husband's rights consequent thereon? When does tenancy by the courtesy occur? What becomes of her personal property and chattels real? What of all her things in possession? What becomes of her choses in action? What the husband's rights if such are due, and recoverable in a court of law? What, if he dies without having reduced them to possession? What, if he survives her, and her choses in action are not yet reduced to possession? How are what is recovered regarded in his hands? What will they render him liable for? What if he die before their reduction to possession? How may he dispose of what he may recover at



law? What if he have to invoke the aid of a court of equity? What are the liabilities of the husband? What releases him from liability? What his obligation as to providing necessities? What beyond? How, where reasonable allowance is made? What liability if husband abandons, or lives separate from her? What liability if she elope and return? What, if he turn her away, and forbid any trusting her? What liability for tortious or fraudulent acts committed by her? When does the wife possess an ability to contract at law? How, when living apart under a decree of the court? How, when living apart under a voluntary separation? In what cases does equity protect the wife? Under what form does it protect her property? Who may be trustee? From whom may the property come? What stipulations will equity compel him to perform? How as to gifts from him after marriage? How as to gifts without intervention of trustees? How is the wife regarded in equity? What her power of contracting? What the ground of her liability for debt? How does equity enforce payment? Are debts existing at the time of the marriage thus enforceable? What illustration? How is the power of disposition exercised by the wife? If a particular mode be pointed out by the instrument, is she precluded from adopting any other mode? And if so, when? With whom may a wife, in equity, contract after marriage? How may she convey real estate and dower right? What liability if a party to a deed containing covenants? What prevents her making a last will and testament? What may she do by permission of her husband? How may she reserve a power, and when execute it? And with what effect? What are ante-nuptial agreements, and how enforced? How is it with settlements made after marriage in pursuance of previous agreements? How, if without previous agreement? How with voluntary settlements made without any consideration? When good as to subsequent creditors? On what condition are they good as between the parties? How, where made with a view to a separation? What does the law not authorize? Subject to what condition, and in what case, can an agreement for a separation be deemed valid? What is the rule as to husband and wife's being witnesses for or against each other in civil suits? What the reason of the rule? What the rule in criminal prosecutions and complaints? What exception? When are declarations of the wife evidence against the husband? When may she bind the husband by her contracts? What is the husband's duty as to maintenance and protection? What power does the law give him as to control and restraint? What, for some time, has been the tendency of legislation as to this relation? What legislation, and when, and to what effect, in the State of New York?

## PART IV.

## PARENT AND CHILD.

§ 754. The rights and reciprocal obligations flowing from this relation, which are of a character enforceable at common law, are not numerous or difficult to be understood. During the child's minority, the parent is bound to provide reasonably for his maintenance and education, and actions may be sustained against him for necessities furnished, and schooling given, to the child. The doctrine has generally been understood to be, that the father is bound to support his minor children, if he be of sufficient ability, even although they have property of their own. But this doctrine has no application to the mother, and in regard to the father there has been so much relaxation, that it is very questionable whether it would now be enforced. The legal obligation, however, ceases on the arrival of the child at his majority, however wealthy the father may be. It is essential to show an authority, either actual or implied, in order that a father may be held bound for debts contracted by the son. The parent is to be the judge of what is necessary for the child, and no third person will be justified in furnishing necessities and charging them to the father, without showing, on the part of the latter, a clear omission of duty. If a father forces his minor children from home, he will be liable for their necessities. The obligations resting on the parent to furnish necessities, naturally results in giving him the custody of their persons, and the value of their labor and services during their minority. While they live with him, and are maintained by him, he should in return be entitled to their labor and services.

§ 755. The parent is vested with the power of subjecting his minor children to such discipline as he may conceive essential to enable him to discharge the important trusts devolved upon him. Although the father, as a general rule,

is entitled to the custody of his minor children, yet the courts have always exercised a discretion, and, if in their judgment, beneficial to the child, have confided it to the mother, or even taken it from both, and placed it elsewhere. So strongly does the law recognize the right in the father, where no circumstances conflict, that he may, by will, create a testamentary guardian, to whom the custody of his minor children may be confided after his death. If he creates no such guardianship, and dies during their minority, the mother is entitled to the guardianship of the person, and in some cases of the estate of the infant, until its arrival at the age of fourteen, when it can choose a guardian for itself.

§ 756. A step-father is not legally entitled, either to the custody, or the services, of the children of his wife by a former husband. He is under no obligations to maintain them. But if he receive them into his family, and treat them as his own children, he is not liable to them in an action for services rendered to him during their minority, although the value of such services may exceed the expenses of their education and support. *Williams v. Hutchinson*, 3 Comst. 312. And as a step-father is not legally entitled to the labor and services of a step-daughter, he cannot maintain an action against another for her seduction. *Bentley v. Richtmyer*, 4 Comst. 38.

#### QUESTIONS.

What are the obligations of the parent during the child's minority? When does the legal obligation cease? What must be shown to hold a father bound for debts contracted by the son? Who judges of what is necessary for the child? What must a third person, furnishing necessities, show to charge the father? What if a father force his minor children from home? What do the obligations resting on the parent give him? What power in relation to discipline? What in relation to the custody of minor children? What right of the father to create testamentary guardian? What if he die without creating such? What are a step-father's rights and obligations as to step-children? When is he not liable for services rendered by them?

## PART V.

## D I V O R C E.

§ 757. The marriage tie, once entered into, creates on the part of each party, a perpetual obligation. Nothing but death or divorce can dissolve it. The means or manner by which the latter is obtained varies in different States. In some it is by the act of the legislature. In others, by a decree of a court. In several of the States there are two different species of divorce; the one, *a mensa et thoro*, a limited one; which depends upon the decree of the court granting it, and which may, whenever circumstances require it, be vacated. The other, *a vinculo matrimonii*, a final one; releasing from the bond of matrimony. The first is of statutory creation, and can only arise from causes authorized by statute. The second may be granted for canonical and civil disabilities, and also for whatever other causes the statute may authorize. The canonical disabilities are consanguinity, affinity, and physical incapacity existing prior to marriage, and which have the effect of rendering the marriage voidable at the election of one of the parties, but, if not annulled during life, cannot be declared void afterwards. The civil disabilities are, a prior marriage, or idiocy, which renders the contract void, *ab initio*. The whole matter is generally regulated by statute, which usually declares the causes which will authorize the dissolution of the marriage tie. And these causes are different in the different States. In New York they are the non-attainment of the age of legal consent; a former marriage still in force; idiocy or lunacy of one of the parties; the obtaining of consent by force or fraud; and physical incapacity. These, existing at the time the marriage was formed, annul the marriage contract, *ab initio*. Adultery is also a cause that may subsequently accrue, and authorizes a divorce, *a vinculo*, subject to the condition stated in the statute. But neither party

can obtain a divorce for this cause, if the other recriminates, and can prove the commission of a similar offence. So, also, if the injured party, subsequent to the adultery, cohabits with, or is reconciled to, the other, after just grounds of belief in the fact, it will constitute a bar to the divorce. The husband will also be precluded from obtaining the divorce if the adultery occur through his active procurement, or passive and conscious toleration of his wife's guilty conduct.

§ 758. The limited or qualified divorces, *a mensa et thoro*, prevail in most of the States, usually as an incident to the remedial powers exercised by the courts of chancery. They also prevail in England. In England either party may apply for them, but in this country the wife is usually the only applicant. Their effect is to suspend, either indefinitely, or for a limited time, the marital relations, and to decree a separation from bed and board, generally with a provision for the wife's support. The most usual causes upon which the decree is granted, are cruel and inhuman treatment on the part of the husband. There has been some difficulty in determining how far this must go to justify the interference of the court in disturbing such important relations. It need not go to the extent of cruelty, but may be granted for such conduct, on the part of the husband, as renders it unsafe and improper for the wife to cohabit with him, and be under his dominion and control. The word *unsafe* may mean reasonable apprehensions of bodily hurt, but the danger must be serious, and no mere austerity of temper, petulance of manners, rudeness of language, or even sallies of passion, which threaten no bodily harm, can be sufficient. The children begotten and born during such separation, are deemed illegitimate, and hence incapable of inheriting property.

§ 759. The most difficult and complicated questions connected with this subject arise out of the effect to be given to foreign divorces. The principle is not doubted but that

divorces regularly obtained in the courts of the State or country where the parties were regularly married and domiciled, are valid everywhere. There is just as little doubt but that a party domiciled in one State, and going into another and there obtaining a divorce in fraud of the laws of the State of his domicile, would be unable to avail himself of it as a valid divorce in the latter State. This question has frequently been presented. Divorces are much more easily obtained in some States than in others. One of the married parties removes into another State, where divorces are easily obtained, for the sole and express purpose of procuring one; and having done so, returns to the State he left single, and a candidate for the formation of new ties. How is such a divorce regarded in the State to which he returns? As having been obtained in fraud of its laws, and hence a mere nullity. *Hanover v. Turner*, 14 *Mass.* 227. *Borden v. Fitch*, 15 *John.* 121.

§ 760. But a question of great difficulty is presented in the case where parties married in one State, procure a divorce in another, after submitting to its jurisdiction, and after a full and fair investigation of the merits of the questions involved. Is such a divorce valid in the State where the parties had their former home? The question has several times arisen in Scotland, where parties, one or both, having had their homes in England, either with or without acquiring a domicile in Scotland, apply for a divorce under the laws of Scotland. In *Utterton v. Tewsh*, *Fergusson's Rep.* 23, English parties domiciled in England, and having acquired no domicile in Scotland, one of them applied for a divorce under the Scottish law. The Consistorial Court in Scotland refused to grant it. But that decision was reversed on appeal, and the divorce directed to be granted. In *Edmondstone v. Lockhart*, *Fergusson*, 209, parties originally English, and married in England, had domiciled in Scotland, where a divorce was applied for, and the question was whether the *lex loci contractus* or the *lex domicilii* was to

govern. The court of review decided in favor of the latter. The question finally came before the House of Lords in England in the case of *Tovey v. Lindsay*, 1 *Dow's Rep.* 117, in which, although the case was remitted back for review without any final decision, yet the view taken of the question was, that the *lex loci contractus* must govern in all such cases, and that the Scottish tribunals could only pronounce the divorce according to English, and not to Scottish law. The question has, however, been before the House of Lords in a more recent case, that of *Warrender v. Warrender*, 9 *Bligh*, 89, in which, under the lead of *Lord Chancellor Brougham*, the Scotch decision in *Edmondstone v. Lockhart*, was confirmed, and the *lex domicilii* declared to be the law which the court should apply to such cases. The principle of this decision would enable the judicial tribunals of the State where the parties were domiciled, to grant divorces valid under their own laws, in whatever State the marriage may have been entered into. But this question may not, perhaps, be considered as entirely settled, especially in the jurisprudence of this country.

#### QUESTIONS.

What effect has the marriage tie once entered into? How may a divorce be obtained? How many different species of divorce? What are they? How created? What are canonical disabilities? What are civil disabilities? What is the whole matter generally regulated by? What are the causes for divorce in New York? What causes existing before marriage? What of subsequent occurrence? What will prevent a party from obtaining a divorce for adultery? What are limited divorces incident to? Which party here applies for them? What is their effect when granted? What are the most usual causes? What kind of conduct will justify such divorce? What gives rise to the most serious questions? What principle is not doubted? What other is also clear? What state of facts illustrates it? In a case where the marriage takes place in one State or country, and a divorce is applied for in another, where the parties are domiciled, which is the law applied, the *lex loci contractus* or the *lex domicilii*? What cases in illustration?





## APPENDIX.



### FORMS.

THE following forms have been selected as those of the most common use in business transactions. The principles that apply to, and govern the most of these, will be found stated in the course of this work. There is, however, an exception in the case of Deeds, Mortgages and Wills, and hence a few remarks upon those topics may not be inappropriate.

Deeds in the State of New York must be under seal, and in order to be available against a subsequent purchaser or incumbrances, must be duly acknowledged and recorded in the County Clerk's Office. A deed, to be effectual, must not only be executed under seal, and in the presence of at least one witness, but must also be delivered either directly to the grantee, or, as an escrow, to some third person, to take effect upon the performance of some condition.

A deed may be a simple quit-claim, or one with covenants of warranty. In the former case, although it purports to convey one's right of expectancy, or possibility of inheritance, it will nevertheless convey only the title which the grantor actually possessed at the time of its execution and delivery. Any subsequently accruing title will remain unaffected by it.

A deed admits of no implied covenants, and hence the grantor can be held to no act or thing not expressly covenanted in the conveyance. In a common warrantee deed, containing simply covenants of warranty and for quiet enjoyment, the grantee must have suffered an eviction from the premises, before he can be entitled to recover against his grantor. But in case a full covenant deed is given, or one containing a covenant of seizin, *that* is broken, and allows an action to be brought immediately on the execution and delivery of the deed, if the grantor has no title.

The deed cannot convey any greater estate or interest than the grantor himself possessed at the time of its delivery, or could then lawfully convey; but it may always be set up as conclusive against the grantor, and all such as claim from him by descent.

No deed can be available to the grantee, if at the time of its execution and delivery, the premises sought to be conveyed, are in the actual possession of a person claiming under a title adverse to that of the grantor, except as against such grantor and his heirs. No title passes to the grantee. A mortgage, however, may be executed under such circumstances, which may be good from the time of the recovery of possession under it.

In the State of New York it is unnecessary to insert the term "heirs," or other words of inheritance, in order to create a conveyance in fee; as every grant of real estate will be held to pass all the interest of the grantor therein, unless it is apparent, by its terms, that a less estate was intended to be granted.

A consideration is necessary to sustain a deed, although the amount of it is immaterial, and in the description of the premises conveyed, known and fixed monuments on the land, whether natural or artificial, will be held to control in preference to courses and distances, and the former will be held to include all the lands within them, although they are found to vary from the quantity expressed in the deed.

A mortgage, although for some purposes deemed a conditional sale, is nevertheless merely a lien, and is regarded simply as a security for a debt, and vests no title in the mortgagee. It is a mere chattel interest, and as such, on the death of the mortgagee, goes to his personal representative, and not to his heir at law. It does not, of itself, imply any covenant to pay the sum intended to be secured by it; and hence in the absence of any such covenant, and of any bond or other similar instrument accompanying the mortgage, the mortgagee will have no remedies beyond the lands described in the instrument.

A mortgage given by the grantee on the purchase, and for the purchase-money, will be good without being executed by the wife of the mortgagor; as the seizin in him of the land is subject to his mortgage; but in all other cases the wife must unite, in the same manner as in a deed, or her right of dower in the premises conveyed will not be barred.

Where large quantities of land are covered by a mortgage, no part can be sold by the mortgagor except subject to its lien; but in case of such sale, equity will interpose, and direct that the part unsold be first applied in payment of the mortgage debt, and if any thing still remains due thereon, that then the portions sold shall be applied on the said mortgage debt in the inverse order of their alienation; that is, that the part last sold shall be first applied on said debt, and so on until the said debt is paid, or all the mortgaged premises applied towards its payment.

A mortgage, like a deed, must be duly executed in the presence of a witness, or officer taking the acknowledgment; must be duly acknowledged and properly recorded in order to protect the mortgagee against subsequent purchasers and incumbrances. All the mortgagee's interest in it may pass by assignment to the assignee, and this latter need not be acknowledged nor recorded, as the recording of the mortgage will be a sufficient protection not only to the

mortgagee, but to all his assigns. The recording of such assignment is not held to be such notice to the mortgagor as will invalidate a payment made by him to the assignor subsequent to the assignment. The assignee, to protect himself against such a contingency, should give to the mortgagor actual notice of the assignment. The acknowledgment and recording of the assignment would have the effect of enabling the assignee, upon payment of the mortgage, to acknowledge satisfaction, so as to have the same discharged of record. Otherwise the original mortgagee will be the proper party to acknowledge the satisfaction.

The remedies upon non-payment of the mortgage are twofold, either to proceed upon the personal liability of the mortgagor, where a note, bond, or other obligation exists, the collection of which would discharge the lien of the mortgage; or to proceed against the mortgaged premises, and to apply them, as far as their proceeds will go, in part or entire satisfaction of the mortgage. If any balance still remains due, the mortgagor will be personally liable to pay it, and if the property brings more than sufficient to pay, then he will be entitled to any such balance as may remain after payment of the debt. The foreclosure may either be in the Court of Chancery, or by a proceeding under the statute, by virtue of the power of sale contained in the mortgage. In the case of a chattel mortgage, the more common course is for the mortgagee, if he desires to close it up, to give the mortgagor notice of sale, and also to give reasonable public notice of the time and place of sale, and then to proceed at such time and place to sell the property, and apply the proceeds upon the debt secured.

A WILL is the legal declaration of a man's intentions of what he wills to be performed after his death. The parties competent to make, or take under it, and the manner of its execution, are matters of statute regulation. In the State of New York all persons except idiots, persons of unsound mind, married women, and in-

fants, may devise their real estate, and such devise may be made to any person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise. All devises to aliens are declared void. It was always competent for married women to devise their separate property under a power reserved for that purpose, and now, since the act of 1849, they are declared competent to convey or devise their separate property.

As to personal property, every male person of the age of eighteen years or upwards, and every female, not being a married woman, of the age of sixteen years or upwards, of sound mind and memory, may dispose of such property by will.

In the State of New York every last will and testament of real or personal property, or both, must be executed and attested, in the following manner :

1. It must be subscribed by the testator at the end of the will. (This is held to mean at the end of the will proper, and where a map of lots is attached to it, and identified in the body of it, it need not be signed.)

2. Such subscription must be made by the testator, in the presence of each of the attesting witnesses, or acknowledged by him to have been so made to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, must declare the instrument so subscribed to be his last will and testament.

4. There must be at least two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the request of the testator.

(Two witnesses are required not only in New York, but also in Pennsylvania, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina and Kentucky, while to a will devising real estate, three are required in Vermont, New Hampshire, Maine,

Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, Mississippi, Michigan, Wisconsin and Iowa.)

5. The witnesses to any will must write opposite to their names their respective places of residence ; and every person who may sign the testator's name to any will, by his direction, must write his own name as a witness to the will. And whoever neglects to comply with either of the foregoing provisions, will forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who may sue for the same. Such omission will not affect the validity of any will ; nor will any person liable to the penalty aforesaid, be excused or incapacitated, on that account, from testifying respecting the execution of such will.

A codicil is an addition or supplement to a will, and must be executed with the same solemnities. It is regarded as a part of the will, the two instruments making together but one will.

The statute prescribing the manner of execution has a very strict construction given to it, both as to the will and codicil. The testator must, in the presence of two witnesses, declare the instrument to be his last will and testament. The declaration to one, and signing it in the presence of two, who subscribe it as witnesses at his request, is insufficient. And so also where the testator did not subscribe the instrument in their presence, and the only acknowledgment was "*I declare the within to be my will and deed*," it was held insufficient.

Wills devising real estate must be executed according to the formalities prescribed by the laws of the place where the real estate is situated, but a will of personal property executed according to the laws of the place of the testator's domicil, will pass all the personal property of the testator wherever the same may be situated.

The term "heirs," or other words of inheritance, need not be

inserted in a will designed to convey an estate in fee. If it be the intention to devise a less estate, appropriate words must be made use of for that purpose.

A will continues ambulatory, or subject to any changes, the testator may see fit to make in it during his life. Or, he may, if he choose, cancel and destroy it, and leave his property to be distributed as the law prescribes. And if he makes a will, and leaves any portion of his property undisposed of under it, his heirs or next of kin will be legally entitled to it. No technical words are required in a will, and the intention of the testator is to be gathered from a full consideration of the whole instrument. No provision in a will, however ample, will prevent the wife's claiming, in addition, her right of dower, or life estate in one-third of all the lands of which the husband was seized during the coverture. To prevent both, the will must expressly declare that the devise or bequest is made in lieu of dower, and then the wife will be at liberty to elect which of the two she will receive.

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## ASSIGNMENTS.

### 1. *Assignment of Judgment.*

*Supreme Court.*—Judgment for \$500. Horace M. Hastings to Samuel Wood. Cost taxed at \$15. Docketed June 2, 1860. Transcript filed in Albany County Clerk's Office, June 3, 1860.

In consideration of                      dollars to me paid by Thomas Simons, of the city of Albany, I hereby assign, sell and transfer the above-mentioned Judgment to him, his heirs and assigns forever, authorizing him to collect and enforce payment of the same in my name or otherwise, but at his own costs and charges, and covenanting that the sum of                      dollars, besides interest, is now due on the same.

Executed this tenth day of August, A. D. 1860.

HORACE M. HASTINGS, [L. s.]

## 2. *Assignment of Mortgage. Endorsed Thereon.*

In consideration of                      dollars to me in hand paid by George W. Palmer, of                      , I do hereby sell, assign, transfer, and set over unto the said George W. Palmer the within indenture of mortgage, together with the bond accompanying the same, for his use and benefit, hereby authorizing him to collect the money due on the same in my name or otherwise, but at his own costs and charges, covenanting that the sum of                      dollars, besides interest, is now due on the same.

Executed this                      day of                      1860.

PETER D. LUDINGTON, [L. s.]

## 3. *Voluntary Assignment by an Insolvent Debtor.*

This Indenture made this                      day of                      , in the year                      , between Elihu J. Granger, of                      , of the first part, and Allen B. Durant, of                      , of the second part,

Whereas the said Elihu J. Granger is justly indebted in sundry large sums of money, and is unable to pay and discharge the same with punctuality, and in full, and he is desirous of making a fair and equitable distribution of his property and effects among his creditors,

Now, therefore, this Indenture witnesseth, that the said Elihu J. Granger, in consideration of the premises, and of the sum of one dollar to him in hand paid, by the party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over; and by these presents doth grant, bargain and sell, assign, transfer and set over, unto the said party of the second part, his heirs and assigns forever, all and singular, his lands, tenements and real estate, a more particular description of which is hereto annexed, and all his goods, chattels, effects, and things in action, of every name, nature and description, of which he is now lawfully possessed, and to which he may be entitled, saving and excepting, from the effect of this assignment, all such articles of household furniture, and other effects as are exempt by law from seizure and sale under execution, to have and to hold the same unto the said party of the second part, his heirs and personal representatives.



In trust, however, and upon the following uses and trusts, that is to say. The said party of the second part shall take immediate possession of all the property and effects hereby assigned, and as fast as he conveniently can, he shall sell and dispose of the same, and convert the same into money, and with the proceeds thereof, shall first pay off and discharge all the reasonable costs, charges and expenses of carrying into effect this assignment; and all rents, taxes, assessments and interest on mortgages that may be necessary to keep and protect from sacrifice the assigned property, and with the residue the said party of the second part shall

First, pay and discharge in full the several and respective debts, bonds, notes, and sums of money due, or to grow due, from the party of the first part, which are designated and stated in Schedule A hereto annexed; and if the assigned effects are insufficient to pay all such sums in full, then to pay the same *pro-rata* as far as said assigned effects will go.

*[The assignor may, in this manner, make as many classes of preferred creditors as he pleases, including them in so many schedules attached to and forming a part of this assignment.]*

Second. By and with the residue and remainder of the said net proceeds and avails, if any there shall be, the said party of the second part shall pay and discharge all the other debts, dues and liabilities of the said party of the first part, provided such remainder shall be sufficient for that purpose, and, if insufficient, then to apply the same *pro-rata* so far as the same will go.

*[If the assignment is by a firm or co-partnership, the direction is to apply all the co-partnership effects to the payment of co-partnership debts, and if any balance remains, to apply it to the payment of the individual debts of each co-partner. And if the individual effects of each co-partner are also assigned, they are directed to be applied first to the payment of the individual debts of each partner respectively, and any balance remaining should be applied to the payment of the co-partnership debts pro-rata, so far as the same will go.]*

Lastly. The said party of the second part shall return the surplus of the said net proceeds and avails, if any there shall be, to the party of the first part, his executors, administrators, or assigns.

And for the better execution of these presents, and of the trusts

hereby reposed, the said party of the first part hereby makes, constitutes and appoints the party of the second part, his true and lawful attorney, irrevocable, with full power and authority to do and transact all matters and things necessary in the premises, as fully and completely as the said party of the first part might or could do, were these presents not executed, and attorneys, one or more, under him to make, constitute, and appoint, with full power of substitution and revocation, hereby ratifying and confirming all matters and things whatsoever that my said attorney shall lawfully do, or cause to be done, in the premises.

In testimony of all which, the party of the first part has hereto set his hand and seal, the day and year above written.

ELIHU J. GRANGER, [L. S.]

Sealed and delivered in  
presence of

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## ARBITRATION.

### 4. *Form of Submission to Arbitration.*

Know all men by these presents, that whereas a controversy is now existing between Henry C. Marvin, of \_\_\_\_\_, and Herbert B. Turner, of \_\_\_\_\_, touching an alleged indebtedness of the latter to the former.

Now, therefore, we the said Henry C. Marvin and Herbert B. Turner, do hereby submit the said controversy to the decision and arbitration of Isaac Bronson, John T. Pingree and John B. Adams, all of \_\_\_\_\_, or to any two of them; and do covenant each with the other, that we will in all things faithfully keep, observe, and abide by, the decision and award that they, or any two of them, may make in writing, in the premises, under their hands, ready to be delivered on or before the first day of January next.

And it is further agreed by the parties hereto, that the party that shall fail to keep, abide by, and observe the decision and award to be made according to the foregoing submission, shall pay to the other the sum of three hundred dollars, as fixed liquidated damages, and not as a penalty.

Executed mutually by the parties to this submission this  
day of \_\_\_\_\_, one thousand eight hundred and sixty.

HENRY C. MARVIN, [L. s.]

HERBERT B. TURNER, [L. s.]

In presence of

### 5. *Award of Arbitrators.*

To all whom these presents may concern, We, Isaac Bronson, John T. Pingree, and John B. Adams, to whose arbitration and award was submitted the matters in controversy existing between Henry C. Marvin and Herbert B. Turner, of \_\_\_\_\_, as appears more fully by their written submission bearing date the day of \_\_\_\_\_, one thousand eight hundred and sixty.

Now, therefore, know ye, that we the said arbitrators, having been first duly sworn according to law, and having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make, publish and declare this our award in writing, that is to say, we find that Herbert B. Turner is indebted to Henry C. Marvin in the just and full sum of one hundred dollars, and we direct and award that Herbert B. Turner, within ten days after service upon him of notice of this award, pay to the said Henry C. Marvin the said sum of one hundred dollars, together with the costs of this arbitration.

In witness whereof we have hereunto subscribed these presents  
this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1860.

ISAAC BRONSON, [L. s.]

JOHN T. PINGREE, [L. s.]

JOHN B. ADAMS, [L. s.]

In presence of \_\_\_\_\_

### BILL OF EXCHANGE.

6. *Form of one of a set of Foreign Bills of Exchange.*  
No. 500.

Exchange for \$5,000.

ALBANY, July 9, 1860.

Twenty days after sight of this First of Exchange (Second and Third unpaid), pay to the order of John H. Camp five thousand

dollars, value received, and charge the same without further advice, to account of

Your ob't serv't,

DEAN SAGE.

To EDWARD M. GREENLY,  
London, England.

[*The other two, that, together with this, compose the set, are in the same form, only varying the numbers first, second, and third.*]

### 7. *Form of Inland Bill or Draft.*

\$500.

ALBANY, Aug. 1, 1860.

Fifteen days after sight, pay to the order of Alonzo J. Handley, five hundred dollars, value received, and charge the same to account of

Yours, &c.,

THADDEUS GRAVES,  
ALBANY, N. Y.

To LEVI ROBINSON,  
Iowa City, Iowa.

### 8. *Form of a Check on a Bank.*

No. 40.

ALBANY, Aug. 1, 1860.

Mechanics' & Farmers' Bank, pay to M. G. Bright, or bearer, five hundred dollars.

JESSE BRIGHT.

\$500.

## NOTES.

### 9. *Form of Note Negotiable by Indorsement.*

\$100.

ALBANY, Aug. 1, 1860.

Three months after date, I promise to pay to the order of Nathaniel Dean one hundred dollars, value received.

CHARLES K. LARD.

10. *Note Negotiable without Indorsement.*

\$100.

ALBANY, Aug. 1, 1860.

Three months after date, I promise to pay to Theodore C. Sears, or bearer, one hundred dollars, value received.

EDWARD WADE.

11. *Note not Negotiable.*

\$500.

ALBANY, Aug. 1, 1860.

Three months after date, I promise to pay Martin I. Townsend five hundred dollars, value received.

GEORGE WOLFORD.

12. *Note Payable at a Bank.*

\$300.

ALBANY, June 1, 1860.

Three months after date, for value received, I promise to pay Elial F. Hall, or order, three hundred dollars at the Mechanics' & Farmers' Bank, Albany.

THEODORE BROWN.

13. *Judgment Note.*

For value received I promise to pay to Sidney Ward, or order, the sum of \_\_\_\_\_, thirty days after date; and I hereby nominate, constitute and appoint the said Sidney Ward, or any attorney at law of this State, my true and lawful attorney, irrevocable, for me and in my name to appear at any court of record of this State, at any time after the above promissory note becomes due, and to waive all process and service thereof, and to confess judgment in favor of the holder hereof, for the sum that may be due and owing hereon, with interest and costs, and waiving all errors, &c.

In witness whereof I have hereunto set my hand and seal, at \_\_\_\_\_, this first day of \_\_\_\_\_

ALEXANDER J. THOMPSON, [L. S.]

Sealed and delivered in  
presence of

*[The object of a note given in the above form, is to enable the holder to enter up judgment thereon if not paid at maturity. This, however, cannot be done in New York or in any of the Eastern States. It is done in some of the Western.]*

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#### 14. *Protest for Non-Payment.*

UNITED STATES OF AMERICA, }  
STATE OF NEW YORK, } ss.

Be it known that on the                      day of                      , in the year                      , at the request of the Mechanics' & Farmers' Bank, I, Wm. W. Frothingham, a Notary Public, duly admitted and sworn, dwelling in the city of Albany, did present the original bill or note which is hereto annexed, and demanded payment thereof, which was refused.

I therefore on the same day and year above written, and after said demand and refusal, duly notified the Drawer and the several indorsers of the non-payment of the same as follows :

By serving personally on                      at  
By leaving at the place of residence of                      at  
with

By putting in the Post-office in this city notices addressed as follows :

One for                      , directed to                      , at  
each of the above-named places being the reputed place of residence of the person to whom the notice was directed, and the Post-office nearest thereto.

Whereupon I, the said Notary, at the request aforesaid, have Protested, and do hereby solemnly Protest, against the drawer and indorsers of the said                      and all others concerned, for all Exchange, Re-Exchange, costs, damages and interest incurred, or to be incurred, by reason of the non-payment of the said

In witness whereof, I have hereunto subscribed my name, and affixed my seal of office.

WM. W. FROTHINGHAM, Notary Public.

### 15. Notice to a Drawer or Indorser.

SIR:

Take notice, That a                                  for  
dollars, indorsed by you, was this day Protested for non-payment,  
and that the holder looks to you for the payment thereof, payment  
of the same having this day been demanded and refused.

Respectfully yours, &c.,

§

W. W. FROTHINGHAM, Notary Public.

16. *Letter of Credit.*

ALBANY, *June*, 20, 1860.

MESSRS. OPDYKE & ACKERMAN :

Gentlemen :—Please deliver to Sidney L. Harris, of this place, goods, wares and merchandise, such as he may select, to any amount not exceeding altogether the sum of one thousand dollars, and I will become responsible to you for the payment of the same, in case Mr. Harris should fail to make payment therefor.

You will please to notify me of the amount for which you may give him credit, and if default should be made in the payment, let me know it immediately.

I am, gentlemen, your most ob't serv't,

SAMUEL D. COZZENS.

TO OPDYKE & ACKERMAN,

No. Nassau street, New York.

17. *Lease.*

This Indenture of Lease made the first day of April, 1860, between C. B. Skinner, of \_\_\_\_\_, of the first part, and W. S. Heyenor, of \_\_\_\_\_, of the second part :

Witnesseth, That the said party of the first part, hereby doth grant, demise and to farm let, unto the said party of the second part, all that [*here describe the premises*] with the appurtenances, for the term of five years from the first day of May, 1860, at the yearly rent or sum of one hundred dollars, to be paid in equal quarter-yearly payments. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the cov-





the above obligation to be void, otherwise to remain in full force and virtue.

W. H. GREEN, [L. s.]

Sealed and delivered in presence of

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### 19. *Bond of Indemnity.*

[Same as preceding down to the Condition.]

Whereas the above bounden W. H. Green and G. S. Tuckerman did obtain judgment in the Supreme Court against W. S. Hevenor for two hundred dollars, damages and costs, whereupon execution has been issued, directed and delivered to Alfred Edwards, commanding him, that of the goods and chattels of the said W. S. Hevenor, he should cause to be made the damages and costs aforesaid; and whereas certain goods and chattels that appear to belong to the said W. S. Hevenor are claimed by Wm. F. Jones, of

Now therefore the condition of this obligation is such, that if the above bounden W. H. Green and G. S. Tuckerman shall well and truly save, keep, and bear harmless, and indemnify the said Alfred Edwards, and all and every person and persons aiding and assisting him in the premises, of and from all harm, damages, costs, suits, actions, judgments and executions, that shall or may, at any time, arise, come, or be brought against him, them or any of them, as well for the levying and making sale under and by virtue of such execution, of all or any goods or chattels which he or they shall or may judge to belong to the said W. S. Hevenor, as well as in entering any shop, store, building or other premises, for the taking of any such goods and chattels; then this obligation to be void, else to remain in full force and virtue.

W. H. GREEN, [L. s.]

G. S. TUCKERMAN, [L. s.]

Sealed and delivered in  
presence of

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### 20. *Bottomry Bond.*

Know all men by these presents, that I, John C. McClure, now master and commander of the vessel called the Artemissa, of the

burden of about five hundred tons, now lying at the port of New Orleans, am held and firmly bound unto Willard J. Gambell, of \_\_\_\_\_, in the sum of four thousand dollars, lawful money of the United States, to be paid to the said Willard J. Gambell, or to his certain Attorney, personal representatives, or assigns, for which payment well and truly to be made, I bind myself, my heirs and personal representatives, and also the said vessel, her tackle, apparel, and furniture, firmly by these presents.

Sealed with my seal at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, one thousand \_\_\_\_\_

Whereas the above bounden John C. McClure has been obliged to take up and borrow, and has received of the said Willard J. Gambell, for the use of the said vessel, and for the purpose of fitting the same for sea, the sum of two thousand dollars, lawful money of the United States, which sum is to be, and remain, as a lien and bottomry on the said vessel, her tackle, apparel and furniture, at the rate or premium of thirty per cent. for the voyage; in consideration whereof all risks of the seas, rivers, enemies, fires, pirates, &c., are to be on account of the said Willard J. Gambell. And for the better security of the said sum and premium, the said master doth, by these presents, hypothecate and assign over to the said Willard J. Gambell, his heirs, personal representatives and assigns, the said vessel, her tackle, apparel, and furniture. And it is hereby declared that the said vessel Artemissa, is thus hypothecated and assigned over for the security of the money so borrowed, and taken up as aforesaid, and shall be delivered for no other use or purpose whatever, until this bond is first paid, together with the premium hereby agreed to be paid thereon.

Now, the condition of this obligation is such, that if the above bounden John C. McClure shall well and truly pay or cause to be paid unto the said Willard J. Gambell, his certain Attorney, personal representatives and assigns, the just and full sum of two thousand dollars, lawful money as aforesaid, being the sum borrowed, and also the premium aforesaid, at or before the expiration of ten days after the arrival of the said vessel at the port of New York, then this obligation and the said hypothecation to be void and of no effect, otherwise to remain in full force and virtue.

JOHN C. McCLURE, [L. s.]

Sealed and delivered in presence of \_\_\_\_\_

21. *Bill of Sale.*

Know all men by these presents, that I John Baldwin, of \_\_\_\_\_, party of the first part, for and in consideration of the sum of two hundred dollars, lawful money of the United States, to me in hand paid, at or before the ensealing and delivery of these presents, by J. H. Ackerman, of the same place, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his personal representatives and assigns, the following articles of personal property, viz., [*Here specify subject-matter of the sale*] to have and to hold the same unto the said party of the second part, his personal representatives and assigns for ever.

And I do for myself, my heirs, and personal representatives, covenant and agree to, and with, the said party of the second part, to warrant and defend the sale of the said goods and chattels, hereby sold unto the said party of the second part, his personal representatives and assigns, against all and every person and persons whomsoever.

[*And if to the ordinary bill of sale be added a covenant of warranty, as of a horse, add*]

And I do hereby warrant the said horse to be sound in every respect, to be free from vice, to be well broken, and kind and gentle in single and in double harness, and under the saddle; and I covenant for myself, my heirs and personal representatives, with the said J. H. Ackerman, to warrant and defend the sale of the said horse unto the said J. H. Ackerman, his personal representatives and assigns, against all and every person and persons, lawfully claiming or to claim the same, whomsoever.

In witness whereof I have hereunto set my hand and seal, this  
day of \_\_\_\_\_, one thousand eight hundred and sixty.

JOHN BALDWIN, [L. s.]

Sealed and delivered in  
presence of



Hakes, of \_\_\_\_\_, of the second part, Witnesseth, that the said Edward Van Ness, in consideration of the covenants on the part of the party of the second part hereinafter contained, doth covenant and agree to, and with the said Harlo Hakes, that (*here insert what the said Edward Van Ness is to perform*).

And the said Harlo Hakes, in consideration of the covenants on the part of the party of the first part, doth covenant and agree to, and with the said Edward Van Ness, that (*here insert what the said Harlo Hakes is to pay or do*).

In testimony whereof, we have hereunto set our hands and seals the day and year first above written.

EDWARD VAN NESS, [L. s.]  
HARLO HAKES, [L. s.]

Sealed and delivered in  
presence of

#### 24. *Contract for Sale of Shares of Stock.*

This agreement entered into this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, between Caleb D. Randall, of \_\_\_\_\_, of the first part, and Redman D. Stephens, of \_\_\_\_\_, of the second part,

Witnesseth, that in consideration of the agreement of Redman D. Stephens hereinafter contained, the said Caleb D. Randall agrees to sell, transfer, and convey, to the said Redman D. Stephens, on the fifth day of July next, and upon payment of the money hereinafter stated, five hundred shares of stock of the Mechanics' and Farmers' Bank, now owned by the said Caleb D. Randall, and standing in his name on the books of the said bank, and to execute and deliver to the said Redman D. Stephens, all necessary assignments, transfers, and conveyances, to assure and convey the same to the said Redman D. Stephens, his personal representatives and assigns forever.

In consideration of which the said Redman D. Stephens agrees with the said Caleb D. Randall, to pay to him one hundred dollars for each share of the said capital stock on the said fifth day of July next.

In witness whereof, we have hereunto set our hands and seals the day and year above written.

CALEB D. RANDALL, [L. s.]  
REDMAN D. STEPHENS, [L. s.]

In presence of

### 25. *Contract for the sale of Land.*

Articles of agreement made this first day of May, one thousand eight hundred and sixty, between Richard M. Strong, of the first part, and Hiram Scofield, of \_\_\_\_\_, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred dollars, to him in hand paid, by the said party of the second part, has contracted and agreed, and does hereby contract and agree to sell to the said party of the second part, all that certain piece or parcel of land, situate in the town of Bethlehem in Albany county and State of New York, and which is bounded and described as follows, viz., beginning at  
(*here insert description of land*).

And the said party of the first part agrees on the first day of May next, to execute and deliver to the said party of the second part, a deed with the common covenants of warranty, and properly acknowledged so that it can be recorded, conveying said land to the party of the second part, his heirs and assigns. And said party of the second part, covenants and agrees with the said party of the first part, that contemporaneously with the delivery of said deed, and as the consideration therefor, and as part and parcel of the same transaction, he will pay to said party of the second part, the sum of five hundred dollars as part of the purchase money thereof, and that he will also at the same time, and as a part of the same transaction, execute and deliver to said party of the first part a bond conditioned to pay two thousand dollars, the balance of the purchase-money, in two equal annual instalments with interest from date, and also in like manner to execute and deliver as security for the payment of said bond, a mortgage in the common form, on said premises, which shall contain a power of sale, and be so acknowledged that it can be recorded.

And it is further agreed that if default be made in fulfilling this

contract, or any part thereof on the part of the party of the second part, then the party of the first part shall be at liberty to consider this contract at an end, and to dispose of the said land to any other person, in the same manner as if this contract had never been made. And each party in case of refusal to perform, hereby agrees to pay to the other, as and for liquidated damages, and not as a penalty, the sum of five hundred dollars.

In witness whereof  
under seal by both parties.

Executed

RICHARD M. STRONG, [L. s.]  
HIRAM SCOFIELD, [L. s.]

In presence of

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## DEEDS.

### 26. *Quit Claim with Covenants against Grantors' Acts.*

This Indenture, made the            day of            , in the year            , between Cornelieus Esseltyne, of            , and Jane his wife, parties of the first part, and Herman V. Esseltyne, of            , party of the second part, Witnesseth, that the said parties of the first part, for and in consideration of the sum of one thousand dollars lawful money of the United States, to them in hand paid by the said party of the second part, at and before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit claimed, and by these presents do remise, release, and quit claim unto the said party of the second part, and to his heirs and assigns forever, all that certain piece and parcel of land, situate, lying and being in the town of            (*here describe the land*), together with all and singular the tenements, hereditaments, and appurtenances, thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower and right of dower property, possession, claims and demands whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above

described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the parties of the first part hereby covenant with the party of the second part that they, nor either of them, have or has done or omitted to do any act or thing whereby, or by means of which, the title to said premises is, or may become destroyed, or in any degree injured or impaired.

In witness whereof the parties have hereunto set their hands and seals the day and year above written.

CORNELIUS ESSELTINE, [L. s.]

JANE ESSELTINE. [L. s.]

In presence of

### 27. *Deed with Covenants of Warranty.*

This Indenture, made this            day of            , in the year            , between John Sanderson, of            , and Elizabeth his wife, parties of the first part, and Charles C. Givens, of            , party of the second part, Witnesseth, that the said parties of the first part, for and in consideration of the sum of five thousand dollars, lawful money of the United States, to them duly paid before the delivery hereof, have bargained and sold, and by these presents, do grant and convey to the said party of the second part, his heirs and assigns forever, all that certain piece or parcel of land, situate, lying, and being in the town of            and which is known and described as follows (*here describe the premises intended to be conveyed*), together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and all the estate, title, and interest, dower and right of dower, of the said parties of the first part, or either of them therein.

And the said John Sanderson for himself, his heirs and personal representatives, doth covenant, grant and agree to, and with the said party of the second part, his heirs and assigns, that at the time of the delivery hereof, he is the lawful owner of the premises above granted, and seized thereof in fee simple absolute, and that



he will warrant and forever defend the above granted premises in the quiet and peaceable possession of the said party of the second part, against any and all persons whomsoever lawfully claiming the same.

In witness whereof

(in the usual form).

JOHN SANDERSON, [L. s.]  
ELIZABETH SANDERSON, [L. s.]

In presence of

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### 28. *Deed with Full Covenants of Warranty.*

This indenture made the                      day of                      ,  
in the year one thousand eight hundred and                      , between  
Andrew Anderson, jr., and Roxana his wife, of                      ,  
of the first part, and Charles C. Bates, of                      ,  
of the second part, Witnesseth, that the said parties of the first  
part, for and in consideration of the sum of  
dollars lawful money of the United States, to them in hand paid by  
the said party of the second part, at or before the ensealing and  
delivery of these presents, the receipt whereof is hereby acknowl-  
edged, have granted, bargained, sold, aliened, remised, released,  
conveyed, and confirmed, and by these presents do grant, bargain  
and sell unto the said party of the second part, his heirs and  
assigns forever all (*here describe the premises intended to be con-  
veyed*) together with all and singular the tenements, hereditaments  
and appurtenances, thereunto belonging, or in any wise appertain-  
ing, and the reversion and reversions, remainder and remainders,  
rents, issues, and profits thereof. And also all the estate, right,  
title, interest, dower and right of dower, property possession, claim  
and demand, whatsoever, as well in law as in equity, of the said  
parties of the first part, of in or to, the above described premises,  
and every part and parcel thereof, with the appurtenances. To  
have and to hold the same unto the said party of the second part,  
his heirs and assigns forever.

And the said Andrew Anderson, jr., for himself his heirs and  
personal representatives, doth covenant, grant and agree to, and  
with the said party of the second part, his heirs and assigns, that

the said Andrew Anderson, jr., at the time of the sealing and delivery of these presents, is lawfully seized in his own right (*if such be the fact*) of a good, absolute and indefeasible estate of inheritance, in fee simple, of and in, all and singular the above granted and described premises, with the appurtenances, and hath good right, full power, and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid; and that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance, of the said parties of the first part, their, or either of their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unincumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assignments, and incumbrances, of what nature or kind soever. And also that the said parties of the first part, and their heirs, and the heirs of each of them, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in, or to, the herein-granted premises, by, from, under, or in trust for, him or them, shall and will, at all time or times, hereafter, upon the reasonable request, and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances, in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel, shall be reasonably advised, devised or required. And the said Andrew Anderson, jr.; for himself and his heirs, the above described, and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part, their or either of their heirs, and against all and every person and persons whom-

soever, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ANDREW ANDERSON, JR., [L. s.]

ROXANA ANDERSON, [L. s.]

In presence of

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### 29. *Trust Deed.*

This Indenture made this            day of  
   between Edward V. R. Evans, of            ,  
of the first part, and Elbert O. Hand of the same place, of the  
second part,

Whereas the said Edward V. R. Evans is desirous of making provision for his daughter Florilla Evans now of the age of thirteen years, against future contingencies, and for her maintenance and support; and whereas the said Edward V. R. Evans is desirous that his said daughter should enjoy the proceeds, rents, issues, and income, of the real estate hereinafter more particularly described, during the term of her natural life, free from the control, liabilities, or interference of any husband she may hereafter have.

Now, therefore, this indenture witnesseth, that the said Edward V. R. Evans in consideration of the premises, and of the sum of one dollar lawful money of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, all that certain lot, piece, or parcel of land, situate, lying, and being in the town of            bounded and described as follows: (*here insert description of the premises*) together with all and singular the tenements, hereditaments, and appurtenances, thereunto belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property,

possession, claim, and demand whatsoever, as well at law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said Elbert O. Hand, his successors and assigns.

*In trust and upon the uses, trusts, and purposes*, hereinafter mentioned, viz.,

*First.* To lease the same, and to take, collect, and receive the rents, issues and profits thereof; and out of the same to keep the said premises in good order and repair, and properly insured, and pay all taxes, assessments, and charges, that may be imposed thereon.

*Second.* To pay the residue of such rents, issues, and income, to my daughter, Florilla Evans, upon her sole and separate receipt, to the intent and purpose that she may enjoy, possess, and have the same, free from the control, interference, or liabilities, of any husband she may hereafter have, during the term of her natural life.

*Third.* To convey the said land and premises to such person or persons as she, the said Florilla Evans, by her last will and testament, or by an instrument in the nature of a last will and testament, subscribed by her in the presence of two credible witnesses, notwithstanding her coverture, may direct and appoint.

And the said Edward V. R. Evans hereby declares, that upon the decease of his said daughter, Florilla Evans, the said trusts, hereby created, shall cease and determine, and the land and premises above described, shall belong, in fee simple absolute, to such person or persons as the said Florilla Evans shall, as aforesaid, direct and appoint; and in default of such appointment, shall revert to the said Edward V. R. Evans, the grantor herein named, and to his heirs, to his and their sole use, benefit, and behoof forever.

And the said party of the second part doth hereby signify his acceptance of this trust, and doth hereby covenant and agree, to and with the said party of the first part, faithfully to discharge and execute the same according to the true intent and meaning of these presents.

In witness whereof, the parties have hereunto set their hands and seals, the day and year first above written.

EDWARD V. R. EVANS, [L. s.]

ELBERT O. HAND, [L. s.]

In presence of

### 30. *Deed of a Water Course.*

This Indenture made

between George L. Stedman of

of the first part, and Sam Vanton of

of the second part, Whereas, the said parties, at the time of the sealing and delivery of these presents are respectively seized in fee, of and in two contiguous tracts, pieces or parcels, of land, with the appurtenances, in the town of

and whereas there is a dam and race, or water course, erected and made in and upon a certain stream of water, known as

, within the land of the said party of the first part, for the purpose of furnishing water for a flouring mill, erected on the land of the said party of the first part, and owned by him. Now, therefore, this indenture witnesseth, that the said party of the first part, for and in consideration of the sum of

dollars to him in hand paid by the party of the second part, at or before the sealing and delivery hereof, (the receipt whereof he does hereby acknowledge,) has granted, bargained, sold, released, and confirmed, and by these presents does grant, bargain, sell, release, and confirm, unto the said party of the second part, his heirs and assigns, all the water of the said stream of water, which may or can be led and conveyed from the easterly side of the said dam, in a race, or flume, to be constructed at the cost, charge, and expense of the party of the second part, feet in width, and

feet in depth, measuring from the surface of the embankment, forming the said dam.

To have and to hold all and singular the said easement and privilege to the said party of the second part, his heirs and assigns forever, as appurtenances belonging to his and their lands as aforesaid.

GEORGE L. STEDMAN, [L. s.]

In witness whereof, &c.

### 31. *Confirmation of Deed by Endorsement by Infant on coming of Age.*

Be it known that the within Indenture was executed by J. Oscar Culver, therein named, while under the age of twenty-one years, who has now attained his full age of twenty-one years; and that the said J. Oscar Culver has on this            day of            , sealed and delivered this present indenture as his own act and deed.

In witness whereof, the said J. Oscar Culver has hereunto set his hand and seal, the day and year above written. Sealed and delivered.

J. OSCAR CULVER, [L. s.]

In presence of

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### MORTGAGE.

### 32. *Mortgage with Power of Sale.*

This Indenture made the            day of            , one thousand eight hundred and sixty, between Cramer Burt of            , party of the first part, and John C. Boyd of            , party of the second part,

Witnesseth, that the said party of the first part, in consideration of five hundred dollars to him duly paid, hath sold, and by these presents doth grant and convey to the said party of the second part, and to his heirs and assigns forever, all (*here describe the premises mortgaged*), with the appurtenances and all the estate, right, title, and interest of the said party of the first part therein.

This grant is intended as a security for the payment of the sum of five hundred dollars, which the said party of the first part is under obligation to pay to the said party of the second part, according to the condition of a certain bond or writing obligatory, bearing even date herewith, executed by the said party of the first part to the said party of the second part, as a security for the same, which payment, if duly made, will render this conveyance void. And if default shall be made in the payment of the principal or interest

above mentioned, then the said party of the second part, and his assigns, are hereby authorized, pursuant to statute, to sell the premises above granted, or so much thereof as will be necessary to satisfy the amount hereby secured, with the costs and expenses allowed by law.

In testimony whereof

(In ordinary form).

In presence of

CRAMER BURT, [L. S.]

### 33. *Mortgage with Covenant to Insure.*

This Indenture made the \_\_\_\_\_ day of \_\_\_\_\_  
between Harris M. Plaisted of \_\_\_\_\_  
of the first part, and Charles B. Randall of \_\_\_\_\_  
of the second part, Witnesseth, that the said party of the first  
part, in consideration of \_\_\_\_\_ to him duly paid,  
hath sold, and by these presents doth grant and convey to the said  
party of the second part, and to his heirs and assigns forever, all  
(*here describe the premises intended to be mortgaged*), with the  
appurtenances, and all the estate, title, and interest of the said  
party of the first part therein.

And the said party of the first part covenants with the said party of the second part, and his assigns, to keep the building now standing or hereafter to be erected on the above-described premises, insured in some solvent insurance company in the State of New York, to the amount of at least \$100,000, and to keep the policy of such insurance assigned to the said party of the second part and his assigns. And in case of any failure in this covenant, the party of the second part or his assigns, may effect an insurance to the amount aforesaid, and the premium and expenses of such insurance may\*be added to, and deemed a part of the moneys hereby secured. This grant is intended as a security for the payment of \$100,000 according to the condition of a certain bond or writing obligatory, bearing even date herewith, executed by the said party of the first part to the said party of the second part, as a collateral security, which payment, together with all the premium and expenses for policies of insurance, if duly

made, will render this conveyance void. And if default shall be made in payment of the principal or interest above mentioned, or in keeping said premises insured, and the policy assigned as herein covenanted for, then the said party of the second part, and his assigns, are hereby authorized, pursuant to Statute, to sell the premises above granted, or so much thereof as will be necessary to satisfy the amount then due, with the costs and expenses allowed by law; rendering the overplus, if any there may be, to the said party of the first part, his heirs or personal representatives or assigns.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written, sealed and delivered.

HARRIS M. PLAISTED, [L. s.]

In presence of

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### 34. *Chattel Mortgage.*

To all to whom these presents shall come greeting, Know ye that I Henry M. Perrin of \_\_\_\_\_, of the first part, for securing the payment of the sum of \_\_\_\_\_, as hereinafter mentioned, and in consideration of the sum of one dollar to me in hand paid, at and before the ensembling and delivery of these presents by Alexander J. Thompson of \_\_\_\_\_, of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, all and singular the goods and chattels mentioned and expressed in the schedule hereto annexed, now remaining and being in

. To have and to hold all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his personal representatives and assigns forever. And the said party of the first part for himself, his heirs and personal representatives, all and singular, the said goods and chattels above bargained and sold unto the said party of the second part, his personal representatives and assigns, against the said party of the first part, and against all and every



person and persons whomsoever shall and will warrant, and by these presents forever defend.

Upon condition that if the said party of the first part shall and do well and truly pay or cause to be paid unto the said party of the second part, his personal representatives or assigns, the sum of

, on the , then these presents, and every thing herein contained, shall cease and be void. And the said party of the first part, for himself, his personal representatives and assigns, doth covenant and agree with the said party of the second part, his personal representatives and assigns, that in case default shall be made in the payment of the said sum above mentioned, or any part thereof, it shall and may be lawful for, and the said party of the first part doth hereby authorize and empower the said party of the second part, his personal representatives and assigns, with the aid and assistance of any person or persons, to enter and come into and upon the dwelling-house and premises of the said party of the first part, and in such other place or places as the said goods or chattels are or may be held or placed, and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain : and out of the money to retain and pay the said sum above mentioned, or any part of the same remaining unpaid, with the interest and all expenses thereon, rendering the overplus, if any, unto the said party of the first part, his personal representatives and assigns. And until default be made in the payment of the aforesaid sum of money, the said party of the first part is to remain and continue in quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same, unless the said party of the second part, his personal representatives or assigns, shall sooner choose to demand the same ; and until such demand be made, the possession of the said party of the first part shall be deemed the possession of an agent or servant, for the sole benefit and advantage of his principal, the said party of the second part.

In witness whereof, the said party of the first part hath hereunto set his hand and seal this      day of      , in the year

HENRY M. PERRIN, [L. s.]

Sealed and delivered in  
presence of

*Schedule referred to in the foregoing Mortgage.*

In the Parlor—One mahogany sofa, ten mahogany chairs, two large looking glasses, one table, &c.

In Dining Room—One dining table, one sideboard, one clock, &c.

Dated

HENRY M. PERRIN.

Witness

35. *Certificate of Acknowledgment of Execution of Deed or Mortgage as used in the State of New York.*

ALBANY COUNTY, ss.

On this first day of June, A. D. 1860, before me personally came Andrew Anderson, Jr., and Roxana his wife, to me known to be the individuals described in, and who executed the within conveyance, and severally acknowledged that they executed the same: And the said Roxana acknowledged, on a private examination by me made, apart from her husband, that she executed the said conveyance freely, and without any fear or compulsion of him.

GEORGE WOLFORD,

Commissioner of Deeds in and for said County.

36. *Bill of Lading.*

Shipped in good order and well conditioned, by Henry B. Atherton, on board the ship called the Rover, whereof Norman Buck is master, now lying in the port of New

SAMUEL BARTON, York, and bound for London, England.

London, England To say, ten packages of merchandise, being marked and numbered as in the margin,

and are to be delivered in the like order and condition at the port of London, England, (the damages of the seas only excepted,) unto Samuel Barton, or to his assigns, he or they paying freight for the said packages the sum of                      dollars, with fifty cents primage and average accustomed.

In witness whereof, the master or purser of said vessel hath

affirmed to two bills of lading, both of this tenor and date ; one of which being accomplished, the other to stand void.

Dated at New York the first day of June, one thousand eight hundred and sixty.

NORMAN BUCK, Master.

### 37. *Marine Policy of Insurance on Ship and Goods.*

A. B. as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part and in all, doth make assurance, and cause himself, and them, and every of them, to be insured, lost or not lost, at and from

upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel, called the

whereof is master, under God, for this present voyage, E. T. or whoever else shall go for master in the same ship, or by whatsoever other name or names the same ship, or the master whereof, is or shall be named or called ; beginning the adventure upon the said goods and merchandises, from the loading thereof aboard the said ship, &c. And further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at

upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety ; and upon the goods, and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever,

without prejudice to this insurance. The said ship, and goods and merchandises, &c., for so much as concerns the assureds, by agreement between the assureds and assurers in this policy, are and shall be valued at

touching the adventures and perils which we the assurers are contented to bear, and to take upon us in this voyage ; they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jetti-

sons, letters of mart, and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have, or shall come to the hurt, detriment or damage, of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said goods, and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof, we the assurers will contribute each one according to the rate and quantity of his sum herein assured.

And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assureds, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us, for this assurance by the assured                      at and after the rate of

In witness whereof, we the assurers have subscribed our names and sums assured this                      day of                      , in the year

MEMORANDUM.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average, under £5 per cent. And all other goods, also the ship and freight, are warranted free from average, under £3 per cent.; unless general, or the ship be stranded.

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## COPARTNERSHIP.

### 38. *Partnership Articles.*

Articles of Copartnership made and entered into this  
                     day of                      , between Jabez Hammond, of  
                     , of the one part, and Sevier Wilson, of                      , of  
 the other part, Witnesseth that the said parties hereto having mutual confidence in each other, do hereby form with each other a copartnership agreement on the terms and conditions following, that is to say:

1. The copartnership shall be for carrying on the business of \_\_\_\_\_, from the \_\_\_\_\_, day of \_\_\_\_\_ for the term of ten years thence next ensuing, with this condition—that either party may be at liberty to dissolve the copartnership at the expiration of each and every two years from the period of its commencement, by serving upon the other, at least three months previous to such expiration, a written notice, specifying that a dissolution will take place at such time.

2. The said copartnership shall be conducted and carried on under the copartnership name, style, and firm of Hammond & Wilson, and the place of business shall be at \_\_\_\_\_, or at such other place or places as the partners shall hereafter determine.

3. The capital of said copartnership shall consist of the sum of \_\_\_\_\_, to be contributed equally to the said business by each of the parties hereto, the same, together with all the income and profits arising from the employment thereof, with the exception of what each is entitled to draw out as hereinafter mentioned, shall become and constitute a permanent fund for copartnership purposes. But each party is entitled to draw out from the profits of the said business, (for his own separate account,) a sum not exceeding \_\_\_\_\_ at the commencement of each and every month while the said copartnership continues, but with the condition that all such sums in the aggregate for the year shall not exceed his share of the profits of the said copartnership, and if he do, he shall repay the same at the close of the year; the agreement being that each copartner shall share equally in all the profits and losses that may arise out of, or occur in the prosecution of, the said copartnership operations.

4. That each of the parties hereto, shall diligently employ himself in the business of the said copartnership, and be faithful to the other in all transactions relating to the same, and give, whenever required, a true account of all business transactions arising out of, or connected with, the conducting of the copartnership, and that neither one of these parties will either by himself, or with any other person or persons, directly, or indirectly, engage in the business of \_\_\_\_\_ [*that of the copartnership*], or in any business except that of the said copartnership, and upon account thereof, and that neither will, without the written consent of the

other, employ either the capital or credit of the copartnership in any other than copartnership business.

5. That books of account shall be kept by the said partners, and proper entries made therein of all the moneys, goods, effects, debts, sales, purchases, receipts, payments, and all other transactions of the said partnership; and that said books of account, together with all bonds, notes, bills, assurances, letters, and other writings belonging to the said partnership, shall be kept where the business of the copartnership shall be carried on, and shall be at all times open to the examination of each copartner.

6. Neither one of the partners, during the continuance of this copartnership, shall assume any liability for another or others by means of indorsement or of becoming guarantor or surety, without first obtaining the consent of the other thereto.

7. At the expiration of each and every year, from the commencement of this copartnership, an account of stock, effects, credits, debts, and all copartnership transactions shall be taken, and the true condition of the copartnership, as far as possible, arrived at, and each partner agrees to lend his aid and services the more completely to effect this object. And in case of the determination of this copartnership from whatever cause, the parties hereto agree to and with each other, that they will make a true, just, and final account of all things relating to their said business, and in all things truly adjust the same. And after all the affairs of the copartnership are adjusted, and its debts paid off and discharged, then all the stock and stocks as well as the gains and increase thereof which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided equally between them.

In testimony whereof the parties to these presents have hereunto set their hands and seals the day and year first above written,

JABEZ HAMMOND, [L. s.]

SEVIER WILSON, [L. s.]

In presence of

### 39. *Form of Notice specified in foregoing Articles.*

To MR. JABEZ HAMMOND :

SIR:—In pursuance of the liberty reserved under the first pro-

vision of our articles of copartnership, I hereby give you due written notice that the copartnership heretofore existing between us under the copartnership name, style, and firm of Hammond & Wilson, will be dissolved, and cease and determine on the day of            next.            Dated at            , the day of            , A. D. 1860.

Respectfully yours,  
SEVIER WILSON.

#### 40. *Form of Renewal to be Endorsed on Articles.*

Inasmuch as the partnership formed between the subscribers by the within agreement will expire on the first day of January next, It is hereby agreed, that the same be continued upon the same terms in every respect as is within mentioned, for the further term of two years from the said first day of January next.

Witness our hands and seals this first day of June, one thousand eight hundred and sixty.

JABEZ HAMMOND,  
SEVIER WILSON.

#### 41. *Agreement for Dissolution to be Endorsed on Articles.*

We, the undersigned, do mutually agree that the copartnership formed between us by the within articles, be and the same is hereby dissolved, except for the purpose of the final liquidation and settlement of the business thereof; and upon such settlement then wholly to determine.

Witness our hands and seals (*as in preceding form*).

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### POWERS OF ATTORNEY

#### 42. *General Power.*

Know all men by these presents, that I, Oscar Frisbie, of            , have made, constituted, and appointed, and by these presents do make, constitute, and appoint Clarence L. Burnet, of

, my true and lawful Attorney for me, and in my name, place and stead, to *(here insert the things which the Attorney is to do)* giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said Attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, &c. *(the usual close)*.

OSCAR FRISBIE, [L. s.]

In presence of

*[Statement of some special matters to be inserted as "things to be done" in the foregoing general form, the commencement and close being as in said form.]*

#### 43. *To Collect Debts.*

To demand, ask, sue for, collect, and receive, all sums of money, debts, rents, dues, accounts, and other demands of every kind, nature, and description whatever, which are due, owing, or payable to me from any person or persons whomsoever, and to give good and sufficient receipts, acquittances, and discharges therefor.

#### 44. *To Sell and Convey Real Estate.*

To enter into and take possession of all the real estate belonging to me, situate in , and to bargain, sell, grant, convey, and confirm, the whole or any part thereof, for such price or sum of money, or on such terms as he may think best, and for me and in my name to make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof, good and sufficient conveyances, with warranty of the same; and to demand, receive, and collect, all sums of money which shall become due and payable to me by reason of such sale or sales.

#### 45. *To Transfer Stock.*

To sell, transfer, and assign all stock of the Mechanics' & Far-



mers' Bank of the City of Albany, standing in my name on the books of the said bank; with power also of Attorney or Attorneys under him for that purpose, to make and substitute with like power, and to do all lawful acts requisite for effecting the premises.

#### 46. *To Vote at Election of Directors, or a Proxy.*

To vote as my proxy at any election of Directors of the Mechanics' & Farmers' Bank, according to the number of votes I should be entitled to vote if then personally present.

#### 47. *Substitution to be Endorsed on the Power of Attorney.*

Know all men by these presents, that I, Clarence L. Burnet, of \_\_\_\_\_, by virtue of the authority to me given by the within power of Attorney, do substitute J. Barton Cook, of \_\_\_\_\_, as Attorney in my stead, to do, perform, and execute, every act and thing which I might or could do by virtue of the within power of Attorney; hereby ratifying and confirming all that the said substitute may do in the premises by virtue hereof and of the within power of Attorney.

In witness whereof, &c. (*usual close*).

CLARENCE L. BURNET, [L. s.]

In presence of

#### 48. *Revocation of Power of Attorney.*

Whereas, I, Oscar Frisbie, of \_\_\_\_\_, by my certain power of Attorney, bearing date the \_\_\_\_\_, did appoint Clarence L. Burnet of the same place, my true and lawful Attorney, for me and in my name, to (*here state what he was authorized to do, using the language made use of in the power of Attorney*) as by the said power of Attorney, reference thereunto being had, will more fully appear.

Therefore know all men by these presents, that I, Oscar Frisbie, aforesaid, have countermanded and revoked, and by these presents do countermand and revoke the said power of Attorney, and authority thereby given to the said Clarence L. Burnet.

In witness whereof, &c. (*usual close*).

OSCAR FRISBIE, [L. s.]

In presence of

## RELEASE.

49. *General Form.*

Know all men by these presents, that I, John M. Harrington, of \_\_\_\_\_, in consideration of one hundred dollars to me in hand paid by John R. Nelson of the same place, have released and forever discharged, and hereby, for myself, my heirs, executors, and administrators, do release and forever discharge the said John R. Nelson, his heirs, and personal representatives, from all claim, demand, and cause of action which I now have, or may hereafter have, against the said John R. Nelson, by reason of any contract which he may have entered into with me for any purpose whatever.

In witness whereof, &c. (*usual close*).

JOHN M. HARRINGTON, [L. s.]

In presence of \_\_\_\_\_

50. *Special Release.*

[*Instead of words "for any cause whatever," as in last example, insert*]

Arising out of any dealings or transactions between myself and the said John R. Nelson, at my store in the City of \_\_\_\_\_

51. *Release of Part of Mortgaged Premises.*

This indenture, made this \_\_\_\_\_ between Chester C. Conant, of \_\_\_\_\_, and David D. Colton, of \_\_\_\_\_, witnesseth: That, whereas, the said David D. Colton, by his indenture of mortgage, bearing date the \_\_\_\_\_, did for the consideration, and for the purposes therein mentioned, convey to the said Chester C. Conant certain lands in \_\_\_\_\_, and of which the lands hereinafter described are part and parcel; and the said David D. Colton, on the day of the date hereof, has paid unto the said Chester C. Conant the sum of \_\_\_\_\_ dollars, being part of the money secured by the mortgage aforesaid, as therein specified, on which payment the said Chester C. Conant hath agreed to release to the said David D. Colton, his heirs and assigns, the lands hereinafter

described, and to take and accept the residue of the said mortgaged premises as his security for the payment of the moneys remaining unpaid on the said mortgage. Now, therefore, the said Chester C. Conant, in consideration of the premises, and of one dollar in hand paid, doth hereby grant, release, assign, and make over to the said David D. Colton, and to his heirs, and assigns forever, all that part of the said mortgaged lands, bounded and described as follows: viz., (*here describe the lands released*) with the hereditaments and appurtenances thereunto belonging, or anywise appertaining. To have and to hold the lands and premises hereby released and conveyed to the said David D. Colton, his heirs and assigns, to his and their own proper use and behoof forever, free, clear, and discharged of and from the lien of the said mortgage.

In witness whereof, &c. (*usual close*).

CHESTER C. CONANT, [L. s.]

In presence of

---

## WILL.

### 52. *Of Real and Personal Estate.*

In the name of God, Amen. I, Henry D. Stratton, of being of sound mind and memory, do hereby make, publish, and declare this my last will and testament, in manner following, that is to say:

*First.* I order and direct my executors hereinafter named, as soon after my decease as practicable, to take possession of my personal estate, and to convert the same into money with as little delay as possible, and with the money so to be realized, to pay off and discharge all the debts, dues, and liabilities that may be existing against me at the time of my decease.

*Second.* I give and bequeath to my wife, Pamela, the sum of ten thousand dollars, provided, and only upon condition, that she receive the same in lieu and discharge of all right of dower in my real estate, her election to be made, and notice given within three months after my decease.

*Third.* I give and devise to my son Henry, his heirs and

assigns, all that tract or parcel of land, situate, lying, and being, in (here describe the premises) together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining. To have and to hold the premises above described to the said Ebenezer, his heirs, and assigns forever.

*Fourth.* I give and devise all the rest and residue of my real estate of every name and nature whatsoever, unto my sons, John and James, to be divided equally between them, share and share alike.

*Fifth.* I give and bequeath all the rest, residue, and remainder of my personal estate, goods and chattels, of what nature or kind soever, and of the moneys realized from the same, except what is already disposed of, to my daughters, Joanna and Josephine, equally share and share alike.

*Lastly.* I hereby nominate, constitute, and appoint H. B. Bryant, J. T. Caulkins, and S. S. Packard the Executors of this my last Will and Testament, hereby revoking all former wills by me made.

In witness whereof I have hereunto set my hand and seal, this  
day of                      , in the year

HENRY D. STRATTON, [L. s.]

The above instrument was, at the date thereof, signed, sealed, published and declared, by the said Henry D. Stratton, as, and for his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

WARREN P. SPENCER, residing at

WILLIAM H. CLARK, residing at

### 53. *Codicil to a Will.*

Whereas, I, Henry D. Stratton, of                      , have made my last will and testament in writing, bearing date the                      , in and by which I have given and bequeathed to my daughters, Joanna and Josephine, all the rest and residue of my personal estate, share and share alike. Now, therefore, I do, by this my writing, which I hereby declare to be a codicil to my said last will and testament,

and to be taken as a part thereof, order and declare that my will is, that said rest and residue of my said personal estate, and the moneys arising therefrom, as described in said will, be divided equally between my said two daughters, Joanna and Josephine, and my granddaughter Helen, the only child of my deceased son Jacob, share and share alike. And it is my desire that this codicil be annexed to, and made a part of, my last will and testament as aforesaid, to all intents and purposes.

In witness whereof, &c. [*same attestation clause as in will, except that instead of reading "as and for his last will and testament," read "as and for a codicil to his last will and testament."*]

[*Witnesses and residences same as in will.*]



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